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In The

Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARY ANN MCCONAUGHY
KEATING, BUCKLIN & MCCORMACK, INC., P.S.
800 Fifth Avenue, Ste. 4141
Seattle, WA 98104-3175
206-623-8861

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether a police officer's acts are "objectively reasonable" and therefore do not violate a fleeing felon's right to be free from unlawful "seizure" under the Fourth Amendment when the officer makes a split-second decision to shoot the felon to protect the lives of fellow officers and specific at-risk persons because it appears to the officer the suspect is about to drive in a manner which puts them at serious risk?

(2) When at the time of an incident, neither this Court nor any circuit court had ruled the Fourth Amendment is violated when an officer uses deadly force to protect innocent persons from the risk of dangerous vehicular flight by a felon, is the law "clearly established" and thus the officer properly denied qualified immunity from civil rights liability?

PARTIES

The parties to the proceeding below were:

Petitioner: Officer Rochelle Brosseau is a City of Puyallup police officer who was a defendant/appellee in the Ninth Circuit. The Puyallup Police Department and the City of Puyallup were also named defendants/appellees, but were dismissed on summary judgment and the Ninth Circuit upheld dismissal of federal civil rights claims against them. Thus, the governmental entities are not parties to this petition. Because petitioner is an individual, no disclosures are required by Supreme Court Rule 29.6.

Respondent: Kenneth J. Haugen is respondent herein and was plaintiff/appellant below.

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PETITION FOR WRIT OF CERTIORARI

Officer Rochelle Brosseau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is reported as *Haugen v. Brosseau*, 339 F.3d 857 (9th Cir. 2003). The original opinion, filed August 4, 2003, is found in the Appendix to this Petition ("App.") at 68-123. The Ninth Circuit's Order Amending Opinion and Denying Rehearing and Amended Opinion is found at App. 1-67. The recent order of the Ninth Circuit Court of Appeals amended both the majority and dissenting opinions and contains a written dissent from the Court's denial of rehearing en banc signed by six judges. The order of the United States District Court for the Western District of Washington granting defendants' motion for summary judgment is unpublished. App. 124-45.

STATEMENT OF JURISDICTION

The opinion and judgment of the Ninth Circuit was entered on August 4, 2003. App. 1. A timely motion for rehearing and rehearing en banc was filed on August 15, 2003. App. 6. On December 5, 2003, the Court of Appeals issued its order amending opinion and denying rehearing and amended opinion. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Haugen initiated this action as a civil rights claim for damages under 42 U.S.C. §1983. The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

This is a Fourth Amendment civil rights use of force case involving a police officer's attempts to control a desperate and combative felon intent upon escape in a motor vehicle. The Ninth Circuit majority opinion is completely at odds with every other circuit court that has considered the Fourth Amendment issue. The opinion below illustrates how the Ninth Circuit continues to void this Court's consistent holdings relating to qualified immunity in §1983 civil rights cases. The majority opinion evoked strongly-worded dissents from one of the panel judges and five other judges who dissented from the circuit decision denying rehearing en banc:

> By declining to rehear this case en banc, the court has failed to recognize the immunity that law enforcement officers rightfully deserve to protect them when they make reasonable split-second life and death decisions in the field. In doing so, the court does a grave injustice to police officers in our circuit like Officer Rochelle Brosseau, who has been wrongfully denied qualified immunity from suit after she employed

> escalating force to stop a combative and determined fleeing felon.

Dissent from denial of rehearing en banc, App. 6.

After numerous less drastic efforts to apprehend respondent Haugen, Officer Rochelle Brosseau made a split-second decision to shoot him as he attempted to speed away in a car because she feared his reckless driving posed a serious risk to nearby citizens and her fellow officers. Petitioner Officer Brosseau confronted circumstances that caused her to believe Haugen posed an imminent threat of injury or death to others. The factual specifics are not disputed. Haugen agreed with the officer's description of the physical setting, conceded that he resisted her escalating use of less drastic force, and admitted he was intent upon escaping in a manner that posed a risk as evidenced by his subsequent guilty plea to charges that he drove in "wanton or willful disregard for the lives or property of others" during the episode. Yet, the Ninth Circuit, inexplicably, viewed this rapidly developing event from the perspective of *the suspect*, not the officer, and rejected her well-founded fears because the tragedy she envisioned did not actually occur.

The majority opinion confused the standard for granting summary judgment which focuses on genuine issues of fact with the standard for determining qualified immunity in a Fourth Amendment use of force case which requires a consideration of the objective reasonableness of an officer's actions *viewed from the perspective of an officer on the scene*. As stated in the d*issent from denial of rehearing en banc:*

> Our own recent case law instructs that the relevant facts and circumstances are *those known to*

> *the officer at the time she acts*, based on *her* contemporaneous knowledge of the facts. *Deorle v. Rutherford,* 272 F.3d 1272, 1281 (9th Cir. 2001). By contrast, the panel majority's opinion displays no sensitivity whatsoever to the difficulties police officers face when making life and death decisions in tense situations, as the Supreme Court tells us we must. *Graham,* 490 U.S. at 396-97.

App. 7 (emphasis in original).

> Rather than looking at the facts and circumstances as Brosseau reasonably perceived them at the time of the shooting, the majority goes to great lengths to explain – with the benefit of hindsight – the small ways in which Officer Brosseau's perceptions were inaccurate. That may be the case. But the Supreme Court tells us that even an officer's *erroneous* perception or belief does not amount to a constitutional violation if it is objectively reasonable.

App. 12 (emphasis in original).

The majority based much of its analysis on the "after-the-fact observation that Haugen, by sheer good luck," was able to avoid striking anyone. But this "does not change the reasonableness of [her] judgment at the time. Unlike the majority, Officer Brosseau did not have the benefit of hindsight." *Id.*, App. 10.

The Ninth Circuit decision creates a split among the Circuits that have considered Fourth Amendment claims under comparable circumstances and effectively eliminates the possibility of qualified immunity for police officers at early stages of litigation. Moreover, it virtually guarantees that officers forced to choose between using deadly force and allowing a dangerous suspect to escape

will be second-guessed in civil rights lawsuits. As the panel dissenting judge remarked:

> The majority's sweeping position, which promises an easy escape to any felon willing to threaten innocent lives by driving recklessly, is indefensible as a matter of law and policy, and it conflicts with our sister circuits' holdings that police officers do not violate the Fourth Amendment by using deadly force to stop a fleeing felon who appears likely to drive an automobile with willful disregard for the lives of others.

Dissenting opinion, App. 48.

1. Incident Giving Rise to Case.

The police shooting that lead to this lawsuit occurred on February 21, 1999. The day before, a man named Greg Tamburello arrived at the City of Puyallup police station to report a burglary at his business in a neighboring town. Tamburello spoke with petitioner Officer Brosseau and identified respondent Kenneth Haugen as the burglary suspect. Brousseau directed Tamburello to file a report with the jurisdiction where the burglary took place. She then checked computerized records and discovered that Haugen had a "felony no bail warrant" for drug-related offenses and other charges.

Haugen was staying at his mother's home in Puyallup with his girlfriend and her three-year-old daughter. Haugen had a lengthy criminal history and was actively avoiding contact with police because he knew he had felony warrants. He admitted that on the day of the shooting he was

spray-painting his white Jeep Cherokee, changing the color to yellow, to assist in avoiding apprehension by the police.

On the day of the shooting, Tamburello learned that Haugen was at his mother's residence. Tamburello and his friend, Matthew Atwood, went to the residence where they contacted Haugen in the front yard in the process of spray painting the Cherokee. Haugen testified that he and Tamburello began "wrestling" and that Atwood and Tamburello were trying to get him into Tamburello's truck to force him to return the stolen tools. The fight was reported to 911 by a neighbor, and police were dispatched.

Officer Brosseau was the first officer to arrive, and Haugen used the momentary diversion as an opportunity to escape. He said he "elbowed Atwood and went for the keys" in the truck. Atwood was able to wrest the keys from Haugen, but Haugen was able to get past Atwood and escape running toward the back of his mother's home along the driveway.

By this time, other police officers were arriving, and area containment was quickly established. A K-9 officer was called and a search begun. While the search was underway, Tamburello and Atwood remained present at the residence. Officers requested that they remain inside Tamburello's truck to avoid contaminating the K-9 search. Likewise, Haugen's girlfriend and her toddler daughter were asked to stay inside her "small red car" parked in Haugen's mother' s driveway.

Approximately 45 minutes later, a neighbor notified police that she saw Haugen in her backyard. Officer Brosseau and a fellow officer responded to the neighbor's house when the report was received that Haugen had been

spotted. The two officers took different routes around the house, and Officer Brosseau saw Haugen run out from between the houses. She radioed fellow officers that she spotted him and gave chase. She saw Haugen run to his mother's house and enter the driver's side of the Jeep Cherokee. Officer Brosseau believed she saw newspaper taped across the windshield, evidently placed there as masking for the spray-paint job Haugen had undertaken.

The Cherokee was parked at a slight angle, facing toward the street with its front end near the front of his girlfriend Deanna Nocera's car. Haugen estimated in deposition testimony, that the front end of the Cherokee was approximately four feet away from the front end of Nocera's small red car. Immediately in back of Nocera's car, completely blocking the driveway exit, was Tamburello's black pick-up. Photographs taken during the subsequent police investigation were available to the court which depicted the general area, location of the vehicles and tire tracks of the Cherokee at the scene.

Officer Brosseau ran to the driver's window and found the door to be locked. She had difficulty looking into the vehicle because the windows were "heavily tinted" and the interior darkened due to newspapers covering the windshield. She could see Haugen inside reaching across the seat.

She pointed her gun at him and yelled for him to place his hands where she could see them. She saw him reaching down to an area on the floorboard and was fearful that he was reaching for a weapon. She then broke the driver's window with her gun although the tinting film held the shattered glass in place. She cleared a space through the window, cutting her hand in the process, and placed the

barrel of her gun on Haugen's left temple yelling repeatedly for him to get out of the car. Officer Brosseau reported that Haugen was yelling "Go ahead and shoot me! You're gonna have to fuckin' kill me!" Officer Brosseau then saw that Haugen had keys in his hand and was attempting to start the car.

Because she had radioed her position and activities after spotting Haugen, Officer Brosseau believed that two officers were closely behind her approaching the area on foot. She also believed that two other officers would be coming "almost immediately thereafter," and she was aware of four persons, including a very young child in parked cars directly in Haugen's path. She was afraid Haugen would recklessly start the car, and either ram the parked cars or run down one of her fellow officers. She was trying everything she could to stop him. She struck him in the head with her weapon as hard as she could in an attempt to "stun him" so that he would not drive off until her backup could arrive. She noted that he did not even attempt to deflect her blows and "seemed strangely focussed [sic] on his actions." She struck again and reached in trying to grab the keys, but Haugen was successful in knocking her arm away.

Haugen then "dived forward" as if to grab something on the floorboard again. Because she was fearful he may retrieve a weapon, she jumped back behind the doorpost against the side of the car for a safer position. She was having difficulties seeing into the car due to the tinting and shadow, but the Jeep abruptly lurched forward spraying gravel. She jumped to the left so that the car would not strike her.

Almost simultaneously with the vehicle starting up, Officer Brosseau decided to fire her weapon. She explained that she was "fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area." Photographs demonstrate that the Jeep was parked between two houses. An officer rapidly approaching the area could have easily run in front of the Jeep without realizing the danger.

While Officer Brosseau was focused on Haugen's activities in the car, Greg Tamburello evidently emerged from his truck to assist her. Haugen testified in his deposition that he saw someone standing near the truck just as he was fleeing the scene. Haugen admits he was "standing on the gas" driving as fast as he could, "[w]ithin a small, tight space," as he swerved across the neighbor's lawn and down the street. Just as the car started up, Officer Brosseau fired one round through the left-side passenger's window aiming at a position which she believed would stop Haugen from driving away and injuring someone.

The Jeep veered to the left, driving onto a neighbor's lawn, and missed hitting the red car, before proceeding down the street as fast as Haugen could go under the circumstances. Matthew Atwood saw events from Tamburello's truck which was parked blocking the driveway exit. As the car started up, he observed Officer Brosseau move back a few steps. He stated that had she not moved, she would have been run over by the rear tires. Atwood reported that the car was accelerating rapidly and that gravel was being thrown around. Atwood stated he was

afraid that Haugen might ram Tamburello's truck with him inside and that the Jeep missed the girlfriend's vehicle by perhaps three or four feet as it "went fish-tailing through the neighbor's front yard." Atwood "took a big, deep breath" when Haugen "went the other way."

Haugen's version of events is largely the same as the other witnesses, except he believes that Officer Brosseau accidentally fired the shot. He knew the police were after him. He agrees that he ran up the driveway and got in his car, locked the doors and began looking for his keys. He acknowledges that Officer Brosseau came to the driver's door demanding that he open the door. He saw that she had drawn her gun and was breaking the window as he was fumbling with the keys. Haugen testified that Officer Brosseau swung at the window with her gun finally breaking it on the third strike.

Haugen testified that on the officer's third strike at the window, the gun broke through the glass, made contact with the underside of his arm which he had raised up to block the flying glass, and *accidentally* discharged.

Haugen's testimony that the officer's gun discharged accidentally at point blank range is contradicted by the fact that there was a bullet hole through the passenger's window behind the driver's seat. The parties to this suit jointly hired a forensic expert to examine physical evidence and offer an opinion on the consistency of evidence with Mr. Haugen's version compared to the officer's and other witnesses' testimony that the gun was fired deliberately. The forensic expert provided a report to the parties expressing the opinion that the physical evidence was consistent with the officer's version of events and inconsistent with Haugen's version. Despite his injury, Haugen

was able to flee the scene and drive approximately one mile at speeds reported by police to be 60-70 mph in a residential area chased by police officers, before he stopped his car. Haugen claimed that his speed was not that great because of his inability to shift into a higher gear due to the injury. He admits, however, driving as fast as he could under the circumstances.

Shortly after driving away, he realized that he had been shot and that he could not breathe. He pulled his car over, opened the door and fell out onto the pavement. Haugen suffered a collapsed lung and was airlifted to a hospital where he was successfully treated. He reports little in the way of ongoing problems from the injury.

Mr. Haugen was prosecuted as a result of these events, and he pleaded guilty to attempting to elude a pursing police vehicle, a violation of Wash. Rev. Code 46.61.024,[1] which entails willful failure to stop a vehicle after being given a signal by a police officer to do so and

[1] Wash. Rev. Code 46.61.024 provides as follows:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be made by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.
>
> The license or permit to drive or any nonresident driving privilege of a person convicted of a violation of this section shall be revoked by the department of licensing.

subsequent driving "in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle."

2. District Court Proceedings.

Mr. Haugen brought suit against Officer Brosseau, the City of Puyallup and the Puyallup Department claiming a Fourth Amendment violation of his civil rights and stating various state tort claim theories. Petitioner and the other defendants moved for summary judgment arguing that qualified immunity barred civil rights claims against Brosseau and that municipal liability for civil rights liability could not be established. They also argued state law claims should be dismissed because a state statute provides a complete defense to actions for damages or injuries when the injured person was engaged in a felony at the time of the occurrence causing injury. Mr. Haugen had previously pleaded guilty to felony charges stemming from the incident. Wash. Rev. Code 4.24.420. The district court granted summary judgment on all issues presented and dismissed all claims.

3. Decisions of the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed the district court's dismissal of Officer Brosseau, but affirmed dismissal of all federal civil rights claims against the city and police department. The Ninth Circuit also reversed dismissal of state claims, and thus the city and police department are still facing state claims in the district court although they are not petitioners here. Both the majority opinion and the dissenting opinion were modified following a petition for rehearing, and a petition for rehearing en banc was

denied. Six judges signed a written dissent from the denial of en banc rehearing.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the Ninth Circuit decision in this case creates a split among the circuits that have considered the underlying constitutional question of whether a police officer violates a felon's Fourth Amendment rights by using deadly force to prevent a dangerous high speed vehicular escape. Also, the lower court's decision conflicts with decisions of other circuits and this Court that have held that qualified immunity protects officers from liability for Fourth Amendment violations unless a reasonable officer would have known her actions violated a suspect's rights. And finally, this case has significant public policy implications because it virtually guarantees that all Fourth Amendment use of deadly force cases will proceed to jury trials in the Ninth Circuit.

1. The Ninth Circuit Opinion that an Officer's Decision to Shoot Under the Facts of this Case Could Violate Fourth Amendment Rights Creates a Split in the Circuits that Have Considered the Issue.

The Ninth Circuit decision in this case contradicts every other court that has considered the constitutional issue, and thus it creates a split among the circuits on the legality of an officer's use of deadly force to halt a fleeing felon intent on reckless vehicular escape. Every other

circuit has held that the Fourth Amendment is not violated when an officer shoots to protect himself or others.

Government officials performing discretionary functions are protected from liability for civil rights violations except when their conduct violates "clearly established" constitutional rights about which a reasonable official should know. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This Court has outlined a two-step process for applying qualified immunity, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged," and second, assuming the violation could be proved, whether the right was "clearly established" under the law at the time. *Saucier v. Katz,* 533 U.S. 194, 200 (2001).

The "first inquiry" involves an identification of the constitutional right in question, here a criminal suspect's Fourth Amendment right to be free from excessive force. *Graham v. Connor,* 490 U.S. 386 (1989). Police officers necessarily are afforded the right to use some degree of physical coercion or threat thereof to affect an arrest. *Id.,* 490 U.S. at 396. Determining whether the force employed by an officer was "excessive" involves answering whether the officer's decision to shoot was "objectively reasonable." This determination "is not capable of precise definition or mechanical application," (*Id.,* citing to *Bell v. Wolfish,* 441 U.S. 520, 559 (1979)) and its application requires "careful attention to the facts and circumstances of each particular case." *Id. The particular use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id.* (emphasis supplied).

In *Saucier v. Katz, supra,* 533 U.S. at 201, this Court articulated the "threshold question" as follows: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" This step then involves an "inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no *Fourth Amendment* violation if the officer can satisfy this standard." *Wilkins v. City of Oakland,* 350 F.3d 949, 954 (9th Cir. 2003) (emphasis in original).

In this case, the officer's fears were well-founded and her response to the situation was objectively reasonable. She *did not violate* Mr. Haugen's civil rights. Yet the Ninth Circuit majority refused to acknowledge that her actions were objectively reasonable, siding with Haugen who claims his driving did not pose a risk even though he later plead guilty to charges that involved "wanton or willful disregard for the lives or property of others."

The Sixth, Eighth, and Eleventh Circuits have held that officers may use deadly force when a fleeing felon appears likely to drive in a manner that places the officer or others at risk. *Scott v. Clay County,* 205 F.3d 867, 877 (6th Cir. 2000) (after fleeing car crashed into a guardrail, officer shot into car as it began to resume a high speed flight); *Smith v. Freland,* 954 F.2d 343, 347-48 (6th Cir. 1992) (officer shot suspect after brief stop where suspect had appeared "trapped" at end of street: "In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably."); *Cole v. Bone,* 993 F.2d 1328, 1330-33 (8th Cir. 1993) (held, decision to shoot driver of speeding tractor-trailer truck who had made multiple dangerous maneuvers toward officers and other

motorists did not violate the Fourth Amendment); and *Pace v. Capobianco,* 283 F.3d 1275, 1281 (11th Cir. 2002) (suspect shot in vehicle with engine running even though blocked from escape by police cars; held, no Fourth Amendment violation because "reasonable police officers could have believed that the chase was not over" based on suspect's conduct during the previous chase).

The majority opinion dismissed Officer Brosseau's concerns that Haugen may have been attempting to retrieve a weapon when he reached down to the floorboards shortly before starting up the car. The Ninth Circuit apparently requires that the officer be sure the suspect not only has a gun but is about to use it, before an officer may shoot to protect herself or others without fear of civil rights liability. *See, majority opinion,* App. 23-24. By the time an officer can justifiably shoot, it may well be too late to prevent harm. The Ninth Circuit's rejection of Brosseau's concerns is at odds with *Reese v. Anderson,* 926 F.2d 494, 501 (5th Cir. 1991). In that case, a man who repeatedly reached below officers' "sight line," was shot by an officer afraid that he was reaching for a weapon. The Court held that shooting under these circumstances did not violate the suspect's rights.

Like the dissenting judge in this case, these other circuits concluded that the initial inquiry about whether a violation occurred may be decided on summary judgment when undisputed facts permit a determination of objective reasonableness. *See, e.g., Scott v. Clay County, supra* at 877:

> Although the Fourth Amendment "reasonableness" inquiry is largely fact-driven, summary judgment for defendant public servants founded in qualified immunity is nonetheless appropriate when the undisputed material facts, or the plaintiff's version of disputed material facts, demonstrate that a hypothetical reasonable officer would not have known that his actions, under the circumstances, were objectively unreasonable.

See also, Pace v. Capobianco, supra at 1279-81; *Smith v. Freland, supra* at 345-46.

The Ninth Circuit grounded its contrary analysis on this Court's admonition that facts should be viewed "in the light most favorable" to Haugen. *See, Saucier v. Katz, supra,* 533 U.S. at 201. In doing so, the Ninth Circuit went well beyond considerations of legitimate factual issues and instead assumed that ultimate conclusions should be viewed in a manner favorable to Haugen. The majority opinion in essence *required* that any alternative judgments about the necessity for force be eliminated before Brosseau's actions could be deemed "objectively reasonable," and therefore not violative of Haugen's rights.[2]

Haugen's version of events is remarkably similar to that of the officer and other witnesses, with one important

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[2] The majority opinion observed as follows:

> [W]e conclude that there is insufficient objective evidence in the record to grant Brosseau's summary judgment motion. Taken in the light most favorable to Haugen, the objective evidence, examined in the light of the totality of circumstances surrounding this case and evaluated as of the time Brosseau actually fired her gun, does not support a conclusion as a matter of law that Brosseau had "probable cause to believe that [Haugen] pose[d] a significant threat of death or serious physical injury to the officer or others."

App. 40.

exception that would *rule out* civil rights liability if he were to be believed.[3] He admits that he locked the car door, and resisted Brosseau's attempts to arrest him even though she broke through the window. He admits she struggled with him for the keys before he finally drove away as fast as he could, etc. Photographs of the relative positions of the vehicles demonstrate that Brosseau's concerns about the situation were *not unreasonable*. Undisputed facts established Haugen's willingness to take whatever means were necessary to escape capture under circumstances where identifiable people were placed at serious risk, as were others nearby. Haugen cannot, and does not, claim he drove reasonably, admitting he drove as fast as he could under the circumstances.

Witnesses seldom, if ever, completely agree on every detail of an occurrence, and opposing parties can hardly be expected to agree on an ultimate issue like whether a decision to shoot was "reasonable." Haugen's claim that his flight was not dangerous should not automatically trump the officer's heat-of-the-moment judgment that he *did* pose a significant risk – at least in situations like this case where sufficient, uncontroverted evidence is readily available to determine how a hypothetical reasonable officer *could* view the situation.

[3] Haugen testified in his deposition that Brosseau shot him by accident, although that appears inconsistent with the physical evidence. If Brosseau had shot Haugen accidentally, this would not subject her to claims of civil rights violations. *Sacramento v. Lewis*, 523 U.S. 833 (1998). *See also,* discussion in *dissent from denial of rehearing en banc,* App. 10-11.

The majority reviewed the various reasons cited by the officer for the shooting decision offering alternative interpretations of acts and events that might render her decision "unreasonable" to another observer. For example, the majority discounted her concerns that Haugen might have been attempting to retrieve a weapon when he reached down to the car floorboard. App. 23-24. It dismissed her legitimate concerns that Haugen might strike one of the vehicles in his path or a nearby officer because Haugen claimed he had not yet started to drive when she shot. The majority observed "we must assume on summary judgment that the Jeep had not even moved when Brosseau shot him." App. 29.

Obviously, the officer's intent was to stop Haugen *before* his driving could injure or kill someone. The majority's analysis is tantamount to a conclusion that because the situation ended without injury, Haugen did not present a risk when she made the decision to shoot – a time when the outcome was far from certain. Moreover, Haugen subsequently drove in a reckless manner. This is "powerful evidence of the reasonableness of Officer Brosseau's earlier belief that he would pose a significant threat" if permitted to escape. App. 51. "[A]n objective observer would have reasonably concluded that Haugen was embarking on a desperate, potentially deadly" flight. App. 62.

The majority opinion evinces a policy preference that police officers allow potentially dangerous felons to escape. There may be circumstances when allowing escape is preferable; but if the escape itself puts others at risk, as it did in this case, police officers can, and should, use force to protect themselves and others from harm. Officers are charged with a duty to apprehend criminal suspects and to protect the public. The officer's option must "be reasonable

in light of the community's strong interest in security and preventing further harm." *Forrett v. Richardson,* 112 F.3d 416, 420 (9th Cir. 1997).

The objective reasonableness standard does not require that all observers come to identical conclusions. If this were true, few cases, would merit summary judgment based on qualified immunity, but rather would routinely proceed for a jury's after-the-fact determination of what it thinks the officer should have done. The Ninth Circuit decision effectively holds that unless no reasonable officer would have *failed* to perceive the situation and act as Brosseau did, a jury trial is required.

This Court has repeatedly rejected the Ninth Circuit's approach in this case. In *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*), the Court reversed a Ninth Circuit decision in another Fourth Amendment §1983 case, disagreeing with the proposition that summary judgment would be inappropriate to decide probable cause unless "there is *only one reasonable conclusion* a jury could reach." (emphasis added) This Court noted that the statement was "wrong" for two reasons – because it "routinely place[d] the question of immunity in the hands of the jury" and because "the court should ask whether the agents acted reasonably under settled law in the circumstances, *not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.*" (emphasis supplied) *See also, Saucier v. Katz, supra*, 533 U.S. at 200 (Supreme Court criticized "leaving the whole matter [of reasonableness] to the jury.")

The opinion is even inconsistent with the Ninth Circuit's own prior ruling in *Forrett v. Richardson, supra* at 420, wherein the Court stated that officers are not

required by the Fourth Amendment to "exhaust every alternative before using justifiable deadly force." Officers are charged with the duty to apprehend criminal suspects and to protect the public. The officer's option must "be reasonable in light of the community's strong interest in security and preventing further harm." *Id.* The opinion in the case at bar invites second-guessing the officer's choice and substituting the purportedly "more reasonable" choice Haugen claims Brosseau should have made.

2. The Ninth Circuit Refused to Apply This Court's Qualified Immunity Rules and Is Contrary to Every Other Circuit Court that Has Considered its Application on Similar Facts.

The most blatantly-incorrect aspect of the Ninth Circuit's opinion is its inexplicable result in the second step of the qualified immunity analysis. This step entails a determination whether the law was so "clearly established" at the time of the incident that any competent officer would know she was violating a person's rights. The qualified immunity doctrine shields government officials from liability even if their conduct is ruled constitutionally impermissible, as long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra*, 457 U.S. at 818.

Reasonable mistakes are entitled to immunity. If "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Here, after briefing, oral argument and lengthy consideration, Ninth Circuit *judges* could not agree that Brosseau's acts were a violation. As dissenting Judge Gould observed, "It should be undeniable

that Officer Brosseau did not violate Haugen's 'clearly established' rights and so was qualifiedly immune from suit." App. 66.

Other circuits that addressed the same legal issue on similar facts have uniformly applied the doctrine to the officer's conduct. *See, Scott v. Clay County, supra* at 877; *Donovan v. City of Milwaukee,* 17 F.3d 944 (7th Cir. 1994); *Smith v. Freland, supra; Cole v. Bone, supra; Pace v. Capobianco, supra.* In fact, at the time of this occurrence every court that had considered this question had ruled that a police officer does not violate a suspect's Fourth Amendment rights in this situation.

Civil rights defendants are entitled to "fair warning" that their actions violate an individual's rights. *Hope v. Pelzer*, 536 U.S. 730 (2002). Claims that an official violated a subject's civil rights are a serious matter, akin to claims of criminal wrongdoing. The important objectives of the qualified immunity doctrine will not be accomplished without further intervention of this Court. Because this decision is obviously inconsistent with existing precedent, the Ninth Circuit should be summarily reversed.

As stated in Judge Gould's dissenting opinion:

> The majority holds Officer Brosseau to an unreasonable standard. Officer Brosseau should be commended, not condemned, for acting with courage and decisiveness to protect the public from a dangerous felon in a deranged mental state embarking on a potentially deadly flight from police. I respectfully dissent.

App. 67.

3. This Case Has Significant Public Policy Implications for Law Enforcement in the Ninth Circuit.

The facts of this case are a compelling demonstration of the reason for the qualified immunity doctrine. The officer was forced to make the extremely difficult decision – whether to use deadly force and potentially take a human life or, having exhausted all other available means, do nothing and run the risk that Haugen's driving would seriously injure or kill bystanders or a fellow officer. The situation was not of her making, and she had to make a choice without the "luxury of a second chance." *See, Whitley v. Albers*, 475 U.S. 312, 320 (1986). Whatever she chose, death or injury to someone *could have* followed.

This decision does exactly what numerous cases have cautioned against:

> We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, supra at 347.

The majority decision has serious implications for officers contemplating the use of force to protect themselves and the public. By significantly increasing the likelihood, in the Ninth Circuit at least, that all such decisions will be subject to second-guessing, the majority has substituted its own policy preferences for that of an officer forced to make the on-scene judgment. Qualified

immunity should provide an "accommodation for reasonable error," and "'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant, supra*, 502 U.S. at 229.

Immunity is intended to avoid the disruption of legitimate and important governmental activities along with the substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Harlow v. Fitzgerald, supra,* 457 U.S. at 814. The Ninth Circuit opinion signals that §1983 cases involving police decisions to use deadly force in tense and dangerous circumstances will routinely be sent to trial. As a result, it thwarts the policy of eliminating expensive and distracting litigation early in the proceedings. Qualified immunity should provide "*immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As summarized in *Saucier v. Katz, supra,* 531 U.S. at 200:

> Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." [citation omitted] The privilege is an "*immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." [citation omitted] As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

(emphasis in original.)

The decision gained the attention of the national press[4] which recognized the implications for police activities throughout the Ninth Circuit and the potential for disrupting police actions aimed at protecting the public. The ruling directly contradicts the rulings of this Court and other circuit courts on a subject that has serious practical impact on important public safety concerns. "The majority opinion creates a new obstacle to effective law enforcement in the western United States. It threatens the innocent to protect the guilty." *Judge Gould's dissenting opinion*, App. 48.

CONCLUSION

For the reasons stated herein, Officer Rochelle Brosseau respectfully requests that the decision of the Ninth Circuit Court be summarily reversed, or alternatively, that the petition for writ of *certiorari* be granted.

Respectfully submitted this 4th day of March, 2004.

MARY ANN MCCONAUGHY
KEATING, BUCKLIN &
MCCORMACK, INC., P.S.
800 Fifth Avenue, Ste. 4141
Seattle, WA 98104-3175
206-623-8861

[4] *See NBC Nightly News, Court: Car Chases Too Dangerous*, dated August 5, 2003.

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kenneth J. Haugen,

Plaintiff-Appellant,

v.

Rochelle Brosseau; Puyallup Police Department; The City of Puyallup,

Defendants-Appellees.

No. 01-35954

D.C. No. CV-01-05018-RJB

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
March 4, 2003 – Seattle, Washington

Filed August 4, 2003
Amended December 5, 2003

Before: Stephen Reinhardt, William A. Fletcher, and Ronald M. Gould, Circuit Judges.

Opinion by Judge William A. Fletcher;

Concurrence by Judge Reinhardt;
Dissent by Judge Gould

COUNSEL

Randy W. Loun, Loun & Tyner, Bremerton, Washington, for the plaintiff-appellant.

Mary Ann McConaughy, Keating Bucklin & McCormack, Seattle, Washington, for the defendants-appellees.

ORDER

This court's opinion, filed August 4, 2003, is amended as follows:

1. The fifth sentence in the full paragraph on slip op. 10604 that reads:

> "Brosseau had not called Subido and Pashon to assist her, and there is no indication that they were running to give her aid."

is deleted.

2. The second sentence in the first full paragraph on slip op. 10608 that now reads:

> "But because officers can often eliminate or reduce the danger of a high-speed chase by forgoing or discontinuing a chase, we reject an approach that would allow officers to shoot a suspect simply because he is fleeing, or is about to flee, in a vehicle."

is replaced with the following two sentences:

> "But the particular circumstances of each case are critical. We reject an approach that would allow officers to shoot a suspect simply because he is fleeing, or is about to flee, in a vehicle."

The dissent, filed August 4, 2003, is amended as follows:

The second and third sentences in the first full paragraph on slip op. 10619 that now read:

> "Nor can I accept the majority's holding that – because police can reduce the danger of a high-speed chase by letting a felon escape – police may never use deadly force to protect the public from the danger posed by a felon's reckless flight from police in a vehicle. The majority's sweeping holding, which promises an easy escape to any felon willing to threaten innocent lives by driving recklessly, is indefensible as a matter of law and policy, and it conflicts with our sister circuits' holdings that police officers do not violate the Fourth Amendment by using deadly force to stop a fleeing felon who appears likely to drive an automobile with willful disregard for the lives of others.[1]"

are replaced with the following sentences:

> "Nor can I accept the majority's implicit suggestion that – because police can reduce the danger of a high-speed chase by letting a felon escape – police may never use deadly force to protect the public from the danger posed by a felon's reckless flight from police in a vehicle. The majority's sweeping position, which promises an easy escape to any felon willing to threaten innocent lives by driving recklessly, is indefensible as a matter of law and policy, and it conflicts with our sister circuits' holdings that police officers do not violate the Fourth Amendment by using deadly force to stop a fleeing felon who appears likely to drive an automobile with willful disregard for the lives of others.[1]"

Footnote 1 remains in the edited text, as shown.

The first two sentences in the third full paragraph on slip op. 10627 that now read:

> "Contrary to the holdings of every circuit to consider the issue, the majority holds that an officer violates a fleeing felon's Fourth Amendment rights by using deadly force to prevent a dangerous vehicular flight because 'officers can often eliminate or reduce the danger of a high-speed chase by forgoing or discontinuing a chase.' *Supra* at 10608.[10] The majority believes that police officers should permit felons to speed away unpursued rather than attempt to stop them. *See id.* at 10605 ("[Officers] could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely."); *id.* at 10607 ("[A]n officer must sometimes forego or discontinue deadly force and allow a suspect to escape.")."

are replaced with the following sentences:

> "Contrary to the holdings of every circuit to consider analogous issues, the majority holds that an officer violates a fleeing felon's Fourth Amendment rights by using deadly force to prevent a dangerous vehicular flight; it appears that the majority believes that officers can reduce the danger of a high-speed chase by forgoing it.[10] The majority believes that police officers should permit felons to speed away unpursued rather than attempt to stop them. *Supra* at ___ ("[Officers] could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely."); *id.* at ___ ("[A]n officer must sometimes forego or discontinue deadly force and allow a suspect to escape.")."

Footnote number 10 remains in the edited text, as shown.

The last sentence appearing on slip op. 10628 that currently reads:

> Moreover, the majority errs by putting the onus on *police* to end the pursuit by letting the felon escape, rather than on the fleeing *felon,* who at all times has the power to avoid injury to himself and others by halting as the law requires. *See id.* at 1004 (holding that a police officer's pursuit of a fleeing felon in an automobile played a "causal role" in an ensuing wreck, "but not the *kind* of cause the law recognizes as culpable. . . . [A] criminal's effort to shift the blame [to police] . . . is not one that any legal system can accept.").

is now supplemented to read:

> Moreover, the majority errs by putting the onus on *police* to end the pursuit by letting the felon escape, rather than on the fleeing *felon,* who at all times has the power to avoid injury to himself and others by halting as the law requires. *See id.* at 1004 (holding that a police officer's pursuit of a fleeing felon in an automobile played a "causal role" in an ensuing wreck, "but not the *kind* of cause the law recognizes as culpable. . . . [A] criminal's effort to shift the blame [to police] . . . is not one that any legal system can accept."). There are several problems with the majority's reasoning.

The first full paragraph on slip op. 10629 currently reads:

> The majority attempts to justify its departure from precedent by reasoning that Officer Brosseau's fellow police officers *might have decided* to let Haugen escape in his jeep unpursued and that, for this reason alone, Officer Brosseau did not have probable cause to believe that Haugen's vehicular flight would pose a danger to

others. There are several problems with the majority's reasoning.

This paragraph should be deleted in its entirety.

With the opinion and dissent as amended, Judge Reinhardt and Judge W. Fletcher voted to deny the petition for rehearing and petition for rehearing en banc.

Judge Gould voted to grant both petition for rehearing and petition for rehearing en banc.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc, filed August 15, 2003, are DENIED.

TALLMAN, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, GOULD, BYBEE, and CALLAHAN join, dissenting from our court's denial of rehearing en banc:

By declining to rehear this case en banc, the court has failed to recognize the immunity that law enforcement officers rightfully deserve to protect them when they make reasonable split-second life and death decisions in the field. In doing so, the court does a grave injustice to police officers in our circuit like Officer Rochelle Brosseau, who has been wrongfully denied qualified immunity from suit after she employed escalating force to stop a combative and determined fleeing felon. I respectfully dissent from the order denying rehearing en banc.

The panel majority fails to properly assess Officer Brosseau's actions when she sought qualified immunity from Haugen's 42 U.S.C. § 1983 action. In an excessive force case, we must examine whether an officer's actions are objectively reasonable in light of what she faces in the field. *Graham v. Connor,* 490 U.S. 386, 397 (1989). Our own recent case law instructs that the relevant facts and circumstances are *those known to the officer at the time she acts,* based on *her* contemporaneous knowledge of the facts. *Deorle v. Rutherford,* 272 F.3d 1272, 1281 (9th Cir. 2001). By contrast, the panel majority's opinion displays no sensitivity whatsoever to the difficulties police officers face when making life and death decisions in tense situations, as the Supreme Court tells us we must. *Graham,* 490 U.S. at 396-97.

Here, Officer Brosseau's contemporaneous knowledge of the facts would lead a reasonable officer to believe that Haugen, based on his desperate behavior, was dangerous to others. Officer Brosseau had been called to the neighborhood just the day before to take a report that Haugen had stolen tools belonging to one Tamburello, his former business associate. After taking this report, Officer Brosseau was informed by a dispatcher that Haugen had a felony no-bail warrant outstanding for drug-related offenses and other charges.

The next day, Brosseau was dispatched to Haugen's house to stop a fight in progress between Haugen and Tamburello. In the course of attempting to take Haugen into custody, Brosseau was confronted with a known felon intent on escaping capture. Haugen actively evaded arrest by hiding in the bushes in a neighbor's yard; he ran to get into his car to drive away; he defied Officer Brosseau's verbal orders to stop; he resisted her attempts to detain

him when she employed lesser degrees of force by shattering the car window, attempting to grab the keys, and hitting him with the butt of her gun. Yet he continued to flee even as she pointed her gun at him. Haugen's behavior would leave no doubt in the mind of any reasonable officer that a high-speed chase was moments away.

The panel majority's opinion utterly fails to demonstrate how Officer Brosseau's perception of these several facts was *objectively* unreasonable. It holds that it was unreasonable for Officer Brosseau to think that if Haugen drove off in his Jeep Cherokee, he would endanger the occupants of other vehicles in the driveway, her fellow officers, and people in the immediate neighborhood. The majority accepts Haugen's testimony that he could easily exit the driveway with no risk of injury to Brosseau's fellow officers or the occupants of the other nearby vehicles, and asserts that "Haugen had a clear path of escape." *Haugen v. Brosseau,* 339 F.3d 857, 874 (9th Cir. 2003).

Yet Brosseau testified that the driveway was "almost completely blocked" by occupied vehicles, and that she believed her fellow officers were on foot nearby. Under *Graham v. Connor,* even an officer's *erroneous* perception or belief does not violate the Fourth Amendment if it is objectively reasonable. 490 U.S. at 396. Was Brosseau's belief erroneous? Maybe; perhaps she misjudged distances in the excitement of quickly-unfolding events. But was it *objectively unreasonable?* No. Her perception of the distances between Haugen's Jeep and the obstacles around it was corroborated by Haugen's own deposition testimony that he was in a "small tight space," that he had to drive "across the lawn, across the curb" to get to the street, and that his girlfriend's car was "parked in front of [his] in the driveway." Even viewing the facts in the light most

favorable to Haugen, his own testimony suggests that a reasonable officer making a split-second judgment to employ force had good reason to worry about the safety of people nearby or directly in the path of Haugen's impending flight. Section 1983 was never intended to be a general negligence statute, but that is exactly the effect of the majority's analysis. *See Johnson v. County of Los Angeles,* 340 F.3d 787, 791 (9th Cir. 2003).

In addition, Brosseau believed that her fellow officers or others might have been standing near Haugen's vehicle because she radioed them for help when she saw Haugen and began chasing him. The majority also asserts that if the officers approached, they would have done so from a safe direction. Brosseau might have been mistaken about whether the other officers were actually in the path of Haugen's vehicle. But was her belief that they might have been nearby *objectively unreasonable*? The two officers on foot with the K-9 unit could easily have heard her radio call or heard the struggle between Brosseau and Haugen, particularly with the noise of his window breaking, and decided to run to the front yard to offer assistance. They could have come from any direction – the majority cites no evidence to suggest that the officers necessarily must have approached from a certain angle. In addition, Haugen testified that Tamburello, with whom he had been fighting just moments before, exited his truck and was also *standing in the driveway* when Haugen drove off. Haugen's girlfriend and her small child were in a nearby Honda where Officer Brosseau had ordered them to remain while the K-9 unit searched for Haugen. Officer Brosseau's fear for the safety of her fellow officers, victim Tamburello, and other citizens was completely reasonable.

The majority emphasizes the fact that Haugen navigated out of the driveway by driving "off to the left around the Honda and pickup," and that he was "able to drive away safely even after Brosseau shot him." *Haugen*, 339 F.3d at 868, 872. But the majority's after-the-fact observation that Haugen, by sheer good luck, did not hit one of these vehicles, an officer, or a bystander as he sped over the curb and across a neighbor's lawn in a desperate and unwavering attempt to escape does not change the reasonableness of Officer Brosseau's judgment at the time. Unlike the majority, Officer Brosseau did not have the benefit of hindsight.

Because this case arose on appeal from summary judgment in favor of Officer Brosseau, we must judge any disputed facts in the light most favorable to Haugen, the non-moving party. However, the majority applies this standard of review only when it suits its purposes. As the learned district judge noted when granting Officer Brosseau's motion, the main factual dispute in this case involves the circumstances surrounding the shooting. When initially examining the conflicting testimony about when the shot was fired, our court accepts Brosseau's version of the events:

> When parties dispute the facts, we typically accept the non-moving party's version when ruling on a summary judgment motion. In this case, however, we accept Brosseau's statement that she shot Haugen intentionally. No gun shot residue was found on Haugen's clothes, and the forensic scientist determined that the bullet hit another object before it struck Haugen. Most tellingly, photos of Haugen's Jeep show a bullet hole in the rear side window. When asked about the bullet hole in the window, Haugen responded:

> "That's something I can't explain." The parties do not dispute that only one shot was fired. Because the evidence unmistakably indicates that Brosseau shot Haugen through the rear side window, *we accept Brosseau's statement that she intentionally shot Haugen through that window rather than Haugen's speculation that the gun discharged accidentally inside the Jeep.*

Haugen, 339 F.3d at 861-62 (emphasis added).

Yet just a few pages later, the majority dismisses Brosseau's claim that the Jeep was "driving in an erratic manner" by noting that "Haugen says that Brosseau shot him before the Jeep even moved. According to Haugen, not only was he not driving 'in an erratic manner,' he was not driving at all." *Id.* at 867. The majority then states that "[a]ccepting the version of the disputed facts most favorable to Haugen, we do not credit Brosseau's assertion that 'he was driving in an erratic manner,' for we must assume on summary judgment *that the Jeep had not even moved when Brosseau shot him.*" *Id.* I respectfully submit that the majority is improperly switching versions of the facts to best suit its argument when it is convenient to do so. Either Brosseau or Haugen is right about when the shot was fired, but not both. Haugen thought the shot was fired accidentally *during the struggle while the Jeep was parked.* The majority determined that his speculation was not supported by evidence, so it rejected his version of events.

Given the majority's rejection of Haugen's statement, we are left with Brosseau's testimony and that of the other eyewitnesses. Brosseau testified that she shot intentionally at the back of Haugen's Jeep *as he started* to drive away. Her statement was corroborated by the physical

evidence. In addition, all the eyewitnesses agreed that Haugen was just starting to pull out of the driveway when Brosseau shot. Even taken in the light most favorable to Haugen, it is clear that the Jeep may not have moved very far, but by all accounts it was moving. Given this evidence and the majority's earlier rejection of Haugen's testimony, it is plainly contradictory for the majority to later assert that the shot was fired during Haugen's struggle with Officer Brosseau *before* he began to drive off.

It was wrong to deny qualified immunity to Officer Brosseau. Rather than looking at the facts and circumstances as Brosseau reasonably perceived them at the time of the shooting, the majority goes to great lengths to explain – with the benefit of hindsight – the small ways in which Officer Brosseau's perceptions were inaccurate. That may be the case. But the Supreme Court tells us that even an officer's *erroneous* perception or belief does not amount to a constitutional violation if it is objectively reasonable. *Graham*, 490 U.S. at 396. Because the majority fails to demonstrate how Officer Brosseau's actions were objectively unreasonable, she should receive immunity from Haugen's suit.

Gilbert and Sullivan were right: "A policeman's lot is not a happy one."[1] The court's erroneous opinion will make them no happier, as it demonstrates the unfairness of judicial second-guessing of split-second decision-making in tense circumstances. I respectfully dissent from the decision not to rehear this case en banc.

[1] William S. Gilbert & Arthur S. Sullivan, *When a Felon's Not Engaged in His Employment (The Policeman's Song)* in *The Pirates of Penzance* (1879).

OPINION

W. FLETCHER, Circuit Judge:

On February 21, 1999, Officer Rochelle Brosseau of the Puyallup, Washington, Police Department shot Kenneth Haugen in the back as he tried to flee from police in his vehicle. Haugen filed a § 1983 suit in district court alleging a violation of his constitutional rights, and the court granted summary judgment to Brosseau. Construing the evidence in the light most favorable to Haugen, we inquire whether Brosseau's use of deadly force violated the Fourth Amendment and, if it did, whether she is entitled to qualified immunity. We conclude that the evidence, so construed, shows that Brosseau's conduct violated the Fourth Amendment, and, further, that her conduct violated clearly established law governing the use of deadly force as set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985). We therefore reverse the district court's grant of summary judgment.

I. Background

Kenneth Haugen and Glen Tamburello were in business together selling drugs and occasionally fixing cars. At some point, their relationship soured, and Haugen decided to dissolve the partnership. On February 20, 1999, he took some of his tools from Tamburello's shop. Tamburello wanted the tools back and wanted retribution. He went to the police station, and, in an interview with Officer Rochelle Brosseau, reported that Haugen had burglarized his shop. Tamburello also contacted the Riddles, neighbors of

Haugen's mother, and requested that they call him should they see Haugen at his mother's house.

Haugen, his girlfriend Deanna Nocera, and Nocera's daughter went to Haugen's mother's residence the night of February 20, where they did some laundry and spent the night. The next morning, Haugen began to spray-paint his 1984 Jeep Cherokee in his mother's driveway. He had a warrant out for his arrest and apparently thought he might evade detection driving a yellow rather than a white Jeep. It was a windy morning, and the Riddles complained to Haugen that the spray paint was blowing into their yard. When Haugen refused to stop, the Riddles called Tamburello. Tamburello drove with Matt Atwood to Haugen's mother's house where they accosted Haugen. Haugen began to run away, but Tamburello caught him, threw him to the ground, and began to beat him up. Haugen and Nocera begged Tamburello to stop, and, after being persuaded by several punches, Haugen agreed to give the tools back. Tamburello and Atwood then forcibly led Haugen into the pickup and planned to drive to a storage facility where Haugen had stashed the tools, but Irene Riddle, having seen the brouhaha outside, had already dialed 911.

After her interview with Tamburello on February 20th, Officer Brosseau had learned that there was a felony no-bail warrant out for Haugen's arrest based on drug and other offenses. The next morning, while in the midst of a traffic stop nearby, Brosseau heard the report of the ruckus at Haugen's mother's house. She responded quickly, and when she arrived Tamburello and Atwood were in the process of getting Haugen into the pickup. Haugen took advantage of the distraction caused by Brosseau's arrival and broke away from his would-be

captors. He ran up the driveway, past his mother's house, and into the backyard. Brosseau gave chase for only a few steps and then called for back-up, including a K-9 unit to help locate Haugen. Over the next half hour or so, Brosseau and other officers interviewed the witnesses still at the scene and set up a containment perimeter for the search. To avoid interfering with the K-9's efforts to locate Haugen by scent, the officers instructed Tamburello and Atwood to remain in Tamburello's pickup and instructed Nocera and her daughter to remain in her Honda. The pickup was parked in the street in front of the driveway. The Honda was parked in the driveway in front of the Jeep. The Jeep was in the driveway facing the Honda and the street and was angled somewhat to the left.

Haugen, meanwhile, hid in various bushes and other locations around the neighborhood as he tried to watch what was happening at his mother's house. Apparently seeking help, Haugen knocked on the back door of Margaret Rounds, a neighbor who lived down the street. No one answered, so Haugen left. Rounds was at home and was aware of the situation outside because she had been listening to a police scanner, but she had no inclination to help Haugen. Instead, she called police and said that there was a man in her backyard. Brosseau and the two other officers on foot, Officers Subido and Pashon (with the K-9), ran to Rounds's backyard. Subido told Brosseau to circle around the front, and as Brosseau rounded the house, she saw Haugen about fifty feet ahead of her running toward his Jeep.

Haugen got into the Jeep and tried to start it. Brosseau ran to the Jeep with her handgun drawn and ordered him to stop. As Haugen fumbled with his keys, Brosseau hit the driver's side window several times with

her handgun, and, on the third or fourth try, she broke the window. Brosseau had mace and a baton but did not use them. Instead, she tried to reach in the car to grab the keys, but just after she broke through the window, Haugen succeeded in starting the Jeep. Either before Haugen pulled away, or just after he started to do so (the evidence is conflicting on this point), Brosseau shot him in the back. From Brosseau's position when she shot, Haugen was in front of her, and beyond Haugen were Nocera, Nocera's daughter, Tamburello, and Atwood. Brosseau said that she was "aware of the background exposure," but she nonetheless believed she had a safe shot because she thought the bullet would be stopped by the Jeep's engine block before reaching the bystanders. Because Haugen did not stop, Brosseau believed she had missed him, but Brosseau did not take a second shot because she thought the risk became too great as he began to drive away.

The bullet entered Haugen's back near the left shoulder blade and lodged in his chest. Despite the wound, Haugen managed, in his words, to "stand on the gas" and to drive out of the driveway, across the neighbor's yard, and onto the street. Photographs in the record show tire tracks on the driveway due to displacement of gravel. After Haugen escaped, some of the officers gave chase. Haugen's injury made it difficult for him to drive. Once he realized he had been shot, he used one hand to hold the wound and the other to drive. According to Haugen, he never got the Jeep past third gear and never drove faster than forty-five miles per hour. Before long, Haugen had difficulty breathing and pulled over to the side of the road, where he passed out. He was apprehended and taken to the hospital.

The precise circumstances of the shooting are disputed. In his deposition, Haugen testified that he believed the gun may have discharged accidentally while Brosseau was reaching through the driver's window grappling with him. Brosseau, on the other hand, says she shot Haugen intentionally. According to Brosseau, she stepped back and away from the driver's window once the Jeep started moving and fired one shot through the rear side window on the driver's side.

When parties dispute the facts, we typically accept the nonmoving party's version when ruling on a summary judgment motion. In this case, however, we accept Brosseau's statement that she shot Haugen intentionally. No gun shot residue was found on Haugen's clothes, and the forensic scientist determined that the bullet hit another object before it struck Haugen. Most tellingly, photos of Haugen's Jeep show a bullet hole in the rear side window. When asked about the bullet hole in the window, Haugen responded: "That's something I can't explain." The parties do not dispute that only one shot was fired. Because the evidence unmistakably indicates that Brosseau shot Haugen through the rear side window, we accept Brosseau's statement that she intentionally shot Haugen through that window rather than Haugen's speculation that the gun discharged accidentally inside the Jeep.

Haugen recovered from the gunshot and filed suit in district court under 42 U.S.C. § 1983 claiming that Brosseau, the Puyallup Police Department, and the City of Puyallup deprived him of his Fourth Amendment rights. He also alleged causes of action based on Washington tort law. The defendants moved for summary judgment, and the district court granted their motion. It held that, even if the shooting constituted excessive force under the Fourth

Amendment, Brosseau had not violated a clearly established right and was therefore protected by qualified immunity. The district court also held that Haugen had not pointed to any official practice that led to a constitutional violation, and so he could not pursue a suit against the police department or the City of Puyallup. Finally, the court held that Haugen could not pursue state tort claims because his injury occurred during the commission of a felony.

Haugen appealed. We review a grant of summary judgment de novo. *See Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir. 2002).

II. Discussion

A. Fourth Amendment Claim Against Brosseau

Officer Brosseau argues that she is entitled to qualified immunity from Haugen's Fourth Amendment claim. Following the Supreme Court's ruling in *Saucier v. Katz*, 533 U.S. 194 (2001), we undertake a two-step analysis when a defendant asserts qualified immunity in a motion for summary judgment. We first face "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If we determine that a constitutional right has been violated, we then move to the second step and "ask whether the right was clearly established" such that "it would be clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted." *Id.* at 201-02.

1. Fourth Amendment Right

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has held that the Fourth Amendment prohibits the use of excessive force by police in the course of apprehending suspected criminals. *See Graham v. Connor,* 490 U.S. 386, 394-95 (1989). In *Tennessee v. Garner,* 471 U.S. 1 (1985), the Supreme Court set forth the specific constitutional rule governing when police officers may use deadly force:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . .
>
> . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force

> may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12. Under *Garner,* deadly force cannot be justified based merely on a slight threat. An officer may not use deadly force "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3.

The application of *Garner* is clear in many cases. Where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force. *See, e.g., Billington v. Smith*, 292 F.3d 1177, 1185 (9th Cir. 2002) (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding that deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (suggesting that the use of deadly force is reasonable where a suspect points a gun at officers); *Garcia v. United States*, 826 F.2d 806, 812 (9th Cir. 1987) (holding that deadly force was reasonable where the decedent attacked an officer with a rock and stick).

On the other hand, the mere fact that a suspect possesses a weapon does not justify deadly force. *See, e.g., Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997) (holding, in the Ruby Ridge civil case, that the FBI's directive to kill any armed adult male was constitutionally unreasonable even though a United States Marshal had already been shot and killed by one of the males); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 324-25 (9th Cir. 1991)

(holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot); *Ting v. United States*, 927 F.2d 1504, 1508-11 (9th Cir. 1991) (holding that deadly force was unreasonable where a suspect had dropped his gun).

In some circumstances, deadly force may be justified based on the nature of the crime committed by the fleeing suspect. *See, e.g., Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) (holding that deadly force was reasonable where a fleeing suspect had shot a victim in the course of a burglary). But the prior commission of even a violent crime does not always justify deadly force. *See Harris*, 126 F.3d at 1203 ("The fact that [the suspect] had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight."); *Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992) (holding that an officer's second use of deadly force was unreasonable even though the suspect had violently assaulted the officer a few minutes before; by the time of the second use of deadly force, the suspect was advancing toward the officer but was wounded and unarmed).

The parties dispute whether, under *Garner*, Officer Brosseau's use of deadly force was reasonable in the circumstances of this case. In a five-page type-written statement and in a lengthy tape-recorded police department interview, Brosseau described the episode and gave her reasons for using deadly force. First, Brosseau stated that, at the time she shot Haugen, she knew that he had a felony no-bail warrant outstanding for drug-related charges, and she had probable cause to believe that he had committed a burglary. Second, Brosseau stated that she saw Haugen reach below the seat of the Jeep, and that she

thought he might be reaching for a weapon. Third, Brosseau stated that she believed Haugen would injure officers or other people in the area by fleeing in the Jeep. She said that he "was driving in an erratic manner," and that she shot him to prevent possible injury to others. We analyze Brosseau's stated reasons in turn.

a. Haugen's Prior Crimes

Brosseau stated that she knew of the warrant for Haugen's arrest and that she believed he had committed a burglary. Under *Garner,* the fact that Brosseau believed Haugen had committed drug crimes and a burglary is not sufficient to justify deadly force. In many deadly force cases, the plaintiff will have committed one or more crimes, but *Garner* and our circuit cases make clear that the mere commission of prior crimes does not justify the use of deadly force. In *Garner* itself, the fleeing suspect was a burglar. *See* 471 U.S. at 3-4. In *Ting*, the suspect was part of a major narcotics organization. *See* 927 F.2d at 1507-08. In *Curnow,* officers believed that the suspect had assaulted a woman. *See* 952 F.2d at 323. In *Andaya*, the suspect had just violently assaulted the officer. *See* 958 F.2d at 883-84. In *Harris*, the suspect had fired shots into the woods and may even have been the man who killed a United States Marshal. *See* 126 F.3d at 1193. In none of these cases, including *Garner*, did the suspect's crime justify the use of deadly force.

Here, Brosseau had reason to believe that Haugen had committed drug crimes and burglary. Drug crimes and burglary are serious offenses, but under *Garner* the critical question is whether the officer has "probable cause to believe that [the suspect] has committed a crime involving

the infliction or threatened infliction of serious physical harm." 471 U.S. at 11. Brosseau had no such probable cause.

b. Haugen's Potential Weapon

Officer Brosseau said she believed that Haugen might have a weapon in the car. When Haugen was running toward the Jeep, Brosseau said that she thought he might be running for a weapon since he would not be running simply to hide there. When she first approached the Jeep, she said that he "reached down to an area on the floorboard in the middle of the front seat" and that she "thought he was reaching for a weapon." Once she broke the window, however, Brosseau saw that he had only keys in his hands. But moments later, just as he started the car, Brosseau said Haugen "dived forward as if to grab something on the floorboard again." Brosseau stated that she feared again that he might have a weapon, and that she therefore stepped back and away from the driver's window.

Brosseau admitted that at the time she shot Haugen, she was not worried that he would use any weapon against her. She had stepped back and away from him, and had positioned herself behind him, so that even if Haugen had had a gun he would not have had a clear shot. She said, however, that she feared if Haugen had a gun he might use it on some officers who might have approached the front of his car, or that he might use it against Tamburello or Atwood, "who he had cause to be unhappy with."

The factual predicate of Brosseau's stated reason is that Haugen dove forward as he started the car. But several other witnesses gave statements about what Haugen was doing in the car. None of these witnesses

mentioned that Haugen dove forward, and none has offered any support for Brosseau's assertion that Haugen looked as if he might have been reaching for a weapon. Nor has Brosseau offered any other evidence to support her belief that Haugen might have had a gun. She did not see a gun in the car, and she had not received any reports that he might have one, or indeed that he had ever had one. Under Ninth Circuit precedent, the mere presence of a weapon does not justify the use of deadly force, *see Harris*, 126 F.3d at 1202; *Curnow*, 952 F.2d at 324-25; *Ting*, 927 F.2d at 1508-11, let alone the *potential* presence of a weapon.

"[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001). Movements by a suspect are not enough to justify deadly force if, in light of the relevant circumstances, those movements would not cause a reasonable officer to believe that the suspect was reaching for a weapon. In support of her stated fear that Haugen was reaching for a weapon, Brosseau has cited no objective factors other than her stated observation that he dove forward and appeared to be reaching for something. Construing all of the relevant facts and circumstances and drawing all reasonable inferences in Haugen's favor, as we must on a motion for summary judgment, we conclude that Brosseau has not demonstrated an objectively reasonable fear about a potential weapon that would justify her use of deadly force.

c. Impending Escape in a Vehicle

Finally, Brosseau asserted that she feared Haugen would injure officers or others when he tried to get away in his Jeep. In her type-written report, Brosseau described her perception of the threat presented by Haugen's escape. In relevant part, her report states:

> I was fearful for the other officers on foot who I believed were in the immediate area, for the occupied vehicles in his path and for any other citizens who might be in the area. It should be noted that the small red car [*i.e.*, Nocera's Honda] was parked directly in front of the Jeep and that I had last seen Nocera and her daughter sitting inside of it. I saw no one between the Jeep and me. I fired one round through the rear driver's side window. I had aimed at a position I perceived would be the driver's location in an attempt to stop him before he could hurt anyone.
>
> . . .
>
> During my encounter with Haugen it was obvious that he was in a wholly unstable frame of mind. He did not exhibit any regard for his own life. I considered Haugen an immediate danger to all around him and made every attempt to stop him including attempting to stun him by striking his head. At this time I am unable to make an accurate estimation of the distance the Jeep was from me when I fired.

In her tape-recorded police department interview, Brosseau further described her decision to use deadly force based on what she perceived as the threat posed by Haugen's imminent escape. The relevant portions of her interview are as follows:

Q. At that point, who then did you become concerned about?

A. . . . [M]y concern at that point and time were for the vehicles directly in front of him. One, which was um, directly in front of him, which is occupied by a woman and her child. And the other officers that I felt were in the immediate area, that were coming on foot to back me up. I was quite sure that some of them were right close to where he was driving.

. . .

Q. How close do you think his uh, speeding car came from striking [Nocera's red Honda]?

A. I don't know.

Q. Okay. Was it within ten feet?

A. I don't know. . . . I'm having some trouble with perceptions of distances.

Q. Okay. Can you estimate how close you were to his car um, when you fired the shot?

A. No. Not at this time.

. . .

Q. Okay. Did, was there a way for him, the Cherokee to get out onto the street by using the driveway?

A. No.

Q. So what did you think he was going to do?

A. Well, the driveway was completely blocked by the uh, the pick up truck. And the little red car was almost completely blocking it as well. So, I thought that his only way out of there was

going to be to, to strike the truck or the little red car, or both.

Q. So the two people in the truck were, were in danger of being struck by a recklessly driven vehicle?

A. Yes.

Q. As well as the little girl and the mother?

A. Yes.

Q. Haugen's girlfriend in the red car? Where, were did you believe the other officers at the scene were, um, during the incident where you, were you, when you fired the shot? At that moment.

A. At that moment uh, can we stop the tape again for a second?

. . .

Q. When you were at the driver's door confronting Haugen, um, where were the other officers at the scene?

A. I, I did not see where they were at.

Q. Where did you think they were at?

A. I presume that they were in the immediate area, approaching to assist me.

. . .

Q. Um, what was your objective when you fired your weapon at the moment you fired the weapon?

A. To protect my fellow officers and the community from an eminent [sic] danger.

Q. You reasonably believed that there was an immediate threat to their life?

A. Yes, I Do.

. . .

Q. Okay. And once again, just so that I know for sure, can you give me an, your basis for the reasonable belief that the other people's lives were threatened?

A. First of all, I still had in mind that he had a weapon. Um, I thought that it would be very difficult for him to try and shoot at me from the position we were at when I fired. Uh, however, I felt that he could've fired on any officers in front of him, or the people in the pick-up truck, uh, who he had cause to be unhappy with. And his driving, more than anything else. His vehicle. I did not believe he could see where he was going. He was driving in an erratic manner. Now had pedestrians and officers and residents in the area.

Brosseau thus indicated in her written statement and interview that she was concerned that Haugen's driving would endanger her "fellow officers," the four people in the Honda and the pickup, and others. She variously characterized these people as "any other citizens who might be in the area," those who were "all around him," "the community," and "residents in the area."

To the extent that Brosseau said she shot Haugen because he "was driving in an erratic manner," her statement is not supported by the evidence regarding the timing of the shooting. Haugen says that Brosseau shot him before the Jeep even moved. According to Haugen, not only was he not driving "in an erratic manner," he was not driving at all. Others stated that, at most, Haugen's Jeep

had just begun to move. Nocera said that Brosseau shot Haugen after he started the Jeep, just as he was "getting ready to pull out," and that it "was barely starting to roll." Aaron Riddle said he heard the shot "pretty much at the same time" that the Jeep started moving. Irene Riddle said she heard the shot just as Haugen first revved up the Jeep. Neighbor Florence Ledbetter across the street said she saw and heard the shot just when the Jeep "started to move." Tamburello stated that the Jeep was already moving, but had gone perhaps six feet. Atwood said that Brosseau shot when the Jeep "just started pulling away," that it "[h]adn't moved very far," and that it had gone "maybe" five or ten feet. Accepting the version of the disputed facts most favorable to Haugen, we do not credit Brosseau's assertion that "he was driving in an erratic manner," for we must assume on summary judgment that the Jeep had not even moved when Brosseau shot him.

Brosseau also stated that she thought Haugen's driving was particularly dangerous because he could not see where he was going. Brosseau said that "the front windshield and at least part of the passenger side windows [of the Jeep] were covered with" the newspaper Haugen had used to protect the glass from the spray paint. Haugen, however, testified that there was no paper on the windshield. Atwood also stated that there was no newspaper on the windshield. Tamburello stated that he saw some paper on one side of the windshield, but that Haugen pulled it off before he got in the Jeep. Because at this stage in the proceedings we must construe the factual evidence in Haugen's favor, we cannot say that there was objective evidence supporting Brosseau's claim that Haugen could not see where he was going as a result of the newspaper covering the windshield.

Brosseau further explained that, at the moment she fired, she did not believe that Haugen's impending escape in the Jeep posed a danger to her, but that it did pose a danger to others in the area. She stated that she was worried, specifically, about Nocera, Nocera's daughter, Tamburello, and Atwood. Nocera and her daughter were inside the red Honda that was parked in the driveway between the Jeep and the street. Tamburello and Atwood were seated in the pickup that was parked in the street at the end of the driveway.

Brosseau indicated that she was worried that Haugen could not escape without hitting the Honda or the pickup. According to Brosseau, the driveway was "completely blocked" by the pickup and "almost completely block[ed]" by the Honda. But Brosseau could not say how close Haugen actually came to hitting the Honda: "I'm having some difficulty with perceptions of distances." Brosseau nonetheless argues that she reasonably believed that Haugen's escape was dangerous because he was likely to hit the Honda or the pickup.

Contrary to Brosseau's statements, Haugen stated that he had an easy escape by driving off to the left around the Honda and pickup. Haugen admitted that he was in a fairly "small, tight space" which was "not like a parking lot," but he said that the driveway was about twenty feet wide and that he had "plenty of room" to drive between the Honda and the neighbor's house without hitting anything. The Jeep was already angled to the left, and Atwood stated that he saw Haugen turn the wheels to the left before putting the Jeep in gear. Haugen said that he had a "clear, straight shot" out of the driveway. The photographs of the scene also show that Haugen had more than enough room to drive away without striking Nocera's Honda or

Tamburello's pickup. Viewing the evidence in Haugen's favor, we conclude that Brosseau has not pointed to objectively reasonable factors to support her belief that Haugen's escape from the driveway posed a significant risk of death or serious injury to the people in the Honda and the pickup.

Brosseau also asserted that she feared for the safety of her fellow officers. She has offered no specific evidence to support this fear. She claims that she "presume[d] that they were in the immediate area, approaching to assist," but she does not claim that she saw them or knew that they were in a dangerous place. She had left officers Subido and Pashon, the only other officers on foot, in Rounds's backyard. Two other officers were in their patrol cars in containment positions on the street several hundred feet to the south of Haugen's mother's house. Atwood, who witnessed the events while seated in Tamburello's pickup, stated that the other two officers were still in the backyard at the time Brosseau fired. Even if they had been running to assist, Subido and Pashon would have been running from the south-east, while Haugen was escaping to the north-west. Thus, while Brosseau stated that she feared that officers on foot might be struck by Haugen's Jeep as he drove away, her statement is no more than a "a simple statement" of fear unsupported by "objective factors." *Deorle*, 272 F.3d at 1281. She has not offered any evidence to support the claim that Haugen posed a significant risk of death or serious bodily injury to fellow officers.

d. High Speed Police Chase

The dissent contends that a need to prevent a dangerous high-speed police chase justified Brosseau's decision to

use deadly force. Brosseau stated that she was concerned about Haugen's erratic driving, but she never stated that she shot to prevent a dangerous high-speed chase, and has not argued to us that a potential chase justified her use of deadly force. In this respect, this case to some extent resembles *Garner,* where the police officer had initially justified his use of deadly force based only on the need to prevent Garner's escape but asserted later – apparently through counsel – that deadly force was justified by Garner's dangerousness. *See Garner*, 471 U.S. at 21. We know from *Graham v. Connor*, 490 U.S. 386, 397 (1989), that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." The relevant facts and circumstances are those known to the officer at the time she acts. "[A]n officer's use of force must be objectively reasonable based on [her] contemporaneous knowledge of the facts." *Deorle*, 272 F.3d at 1281. We examine the objective facts and circumstances known to Brosseau at the time she acted to determine whether she had probable cause to believe that a potential high-speed chase "pose[d] a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3.

At the time Brosseau shot Haugen, it was clear that he intended to flee in his Jeep and that a number of non-lethal measures had failed to prevent him from doing so. But it is equally clear that Brosseau and her fellow officers did not need to kill Haugen in order to avoid a dangerous high-speed chase. They could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely. Haugen had already remained at large for

several months while his no-bail warrant was outstanding, and there is no reason that the events of February 20 and 21 suddenly made his freedom an immediate threat to public safety. The cost to society of allowing criminals to flee is great, but the Supreme Court has held that this cost does not always justify deadly force. "It is not better that all felony suspects die than that they escape." *Id.* at 11.

Because Brosseau has made no argument based on the danger of a potential high-speed chase, there is nothing in the record to tell us whether, under the Puyallup Police Department policies or other applicable rules, it would have been appropriate for the officers to initiate or continue a high-speed chase that posed a significant danger to others. We note, however, that under Washington law, police officers in pursuit must drive with due regard for the safety of others. *See* Wash. Rev. Code § 46.61.035. Officers in Washington may be held liable for injuries caused during high-speed chases, and, to comport with their state law duty of care, they must recognize "that at times it would be more prudent to cease a pursuit in order to protect the public." *Mason v. Bitton*, 534 P.2d 1360, 1363 (Wash. 1975).

Different states and localities have different laws and policies regarding police pursuit. Many have recognized that officers have duties of care in relation to vehicular pursuits, and that officers may be unreasonable in initiating or continuing high-speed chases depending, among other things, on the nature of the suspect's crimes.[1]

[1] *See, e.g., Biscoe v. Arlington County*, 738 F.2d 1352, 1363 (D.C. Cir. 1984) (applying D.C. law); *Seals v. City of Columbia*, 641 So.2d 1247, 1248 (Ala. 1994); *Estate of Aten v. City of Tucson*, 817 P.2d 951,

(Continued on following page)

"Unusual circumstances may make it reasonable" for police to initiate or continue high-speed chases, but "such conduct is not justified unless the end itself is of sufficient social value." *Haynes v. Hamilton County*, 883 S.W.2d 606, 611 (Tenn. 1994). "The decision to initiate or continue pursuit may be negligent when the heightened risk of injury to third parties is unreasonable in relation to the interest in apprehending suspects." *Travis v. City of Mesquite*, 830 S.W.2d 94, 99 (Tex. 1992). A ruling that allowed officers to use deadly force to prevent all vehicular escapes would have the paradoxical result that officers could reasonably shoot to kill even when, under state law, they could not reasonably initiate or continue a chase.

The dissent concludes that a justifiable means of eliminating the danger of a possible high-speed chase in this case is to shoot the suspect before he begins to drive

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955 (Ariz. Ct. App. 1991); *City of Caddo Valley v. George*, 9 S.W.3d 481, 487 (Ark. 2000); *Brummett v. County of Sacramento*, 582 P.2d 952, 956 (Cal. 1978); *Tetro v. Town of Stratford*, 458 A.2d 5, 8-10 (Conn. 1983); *City of Pinellas Park v. Brown*, 604 So.2d 1222, 1225 (Fla. 1992); *Cameron v. Lang*, 549 S.E.2d 341, 347-48 (Ga. 2001); *Boyer v. State*, 594 A.2d 121, 132 (Md. 1991); *Fiser v. City of Ann Arbor*, 339 N.W.2d 413, 417 (Mich. 1983) (overruled in part, *Robinson v. City of Detroit*, 613 N.W.2d 307 (Mich. 2000)); *Smith v. City of West Point*, 475 So.2d 816, 818 (Miss. 1985); *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 292 (Mo. Ct. App. 1983); *Lee v. City of Omaha*, 307 N.W.2d 800, 803 (Neb. 1981); *Selkowitz v. County of Nassau*, 379 N.E.2d 1140, 1143 (N.Y. 1978); *Parish v. Hill*, 513 S.E.2d 547, 550 (N.C. 1999); *Jones v. Ahlberg*, 489 N.W.2d 576, 580 (N.D. 1992); *Lowrimore v. Dimmitt*, 797 P.2d 1027, 1030-31 (Or. 1990); *Kuzmics v. Santiago*, 389 A.2d 587, 590 (Pa. Super. Ct. 1978); *Haynes v. Hamilton County*, 883 S.W.2d 606, 610-11 (Tenn. 1994); *Travis v. City of Mesquite*, 830 S.W.2d 94, 99 (Tex. 1992); New Jersey Police Vehicular Pursuit Policy, Att'y Gen. Guidelines (Dec. 2001); Los Angeles Police Dep't Manual, ch. 555 (2003); Seattle Police Dep't Policies & Procedures § 1.141 (2003).

away. The dissent relies on an article, not cited by the parties, attesting to the danger of police chases. *See* dissent at 10622, n.5 (citing John Hill, *High Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI Law Enforcement Bulletin 14 (July 2002)). But the article reaches quite a different conclusion from the dissent. Even after a suspect has fled and a pursuit has been initiated,

> [t]he most effective way to reduce risks is to terminate a pursuit. Clearly, too many pursuits continue that officers obviously should have terminated. Research on pursuit data and statistics show that termination dramatically could reduce traffic accidents, fatalities, and injuries. Police must reevaluate their thinking and mission. Agencies rarely can justify endangering the public to pursue a violator.

Hill, *supra*, at 16 (endnote omitted). Thus, just as *Garner* instructs that, to comply with the Fourth Amendment, an officer must sometimes forgo or discontinue deadly force and allow a suspect to escape, *see* 471 U.S. at 11-12, state tort laws and police practice experts instruct that an officer must sometimes forgo a chase and allow a suspect to escape.

It is no less true in potential high-speed chases than in other circumstances that an officer may appropriately use deadly force if "necessary to prevent an escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3. But the particular circumstances of each case are critical. We reject an approach that would allow officers to shoot a suspect simply because he is fleeing, or is about to flee, in a vehicle. Such an approach would essentially limit the Supreme Court's

holding in *Garner* to cases where a suspect flees on foot. The Court's opinion contains no such limitation, and we decline to read such a limitation into it.

To support its contention that the possibility of a dangerous high-speed chase justified Brosseau's use of deadly force in this case, the dissent cites general statistics of the dangers of car chases. These statistics have not been supplied by the parties, and perforce have not been relied on by Brosseau or responded to by Haugen. Moreover, even if we could properly take judicial notice of statistics of car chases, the Supreme Court already has rejected this kind of general statistical approach to prove dangerousness in an individual case. In *Garner*, Tennessee attempted to justify its use of deadly force on a fleeing burglar by noting that 3.8% of burglaries involved violent crime, accounting for literally millions of incidents of violence. *See id.* at 21-22 & n.23. But the Supreme Court held that the general statistical probability alone cannot justify deadly force. A generalized assessment of dangerousness of burglars "could not, without regard to the other circumstances, automatically justify the use of deadly force." *Id.* at 21.

In some fairly extreme circumstances, our sister circuits have held that the danger presented by suspects who flee in vehicles can justify deadly force. In *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992), the Sixth Circuit held that an officer was justified in using deadly force after a suspect had led police on a high-speed chase at speeds over ninety miles per hour, swerved toward police cars several times, and smashed into an officer's car while the officer stood next to it. In *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993), the Eighth Circuit held that deadly force was justified where the suspects, driving an

eighteen-wheel tractor-trailer, had led police on an extended chase at speeds over ninety miles per hour through heavy traffic, forcing over 100 cars off the road, and had swerved at pursuing police several times. In that case, before using deadly force, the police had attempted roadblocks and had tried to disable the truck by shooting the tires and radiator. In *Scott v. Clay County*, 205 F.3d 867, 877-78 (6th Cir. 2000), the Sixth Circuit held that deadly force was justified where the suspect had swerved off the road, narrowly missed an unmarked cruiser and a sheriff on foot, led police on a twenty-minute chase at speeds up to 100 miles per hour, and after losing control, attempted to run down an officer. In *Pace v. Capobianco*, 283 F.3d 1275, 1281-82 (11th Cir. 2002), the Eleventh Circuit held that deadly force was justified where a suspect, already pepper-sprayed after struggling with an officer, led police on an extended high-speed chase, during which he made erratic turns, drove on the wrong side of the road with his headlights off, swerved at oncoming cars, drove through a yard, nearly hit a motorist, and then accelerated toward a patrol car.

But our sister circuits have also held that police chases – even high-speed chases – do not always justify deadly force. *See Vaughan v. Cox*, 264 F.3d 1027, 1031-34 (11th Cir. 2001), *vacated by* 536 U.S. 953 (2002), *reinstated and supplemented on remand at* 316 F.3d 1210 (11th Cir. 2003); *Donovan v. City of Milwaukee*, 17 F.3d 944, 946-51 (7th Cir. 1994). In *Vaughan*, officers pursued a vehicle that had rammed a patrol car and then accelerated to eighty or eighty-five miles per hour in an attempt to avoid capture. In an attempt "to disable either the truck or [the driver]" one of the officers fired three rounds into the truck. One of the bullets struck the passenger in the truck, puncturing

his spine. The Eleventh Circuit held, in those circumstances, that "a reasonable jury could find that [the suspects'] escape did not present an immediate threat of serious harm to [officers] or others on the road." 264 F.3d at 1034. *See also id.* at 1034 n.8 (distinguishing that case from *Smith*, *Cole*, and *Scott*). In *Donovan,* the Seventh Circuit held that officers engaged in a high-speed pursuit were not justified in using deadly force – in this case, a road block – to stop a fleeing motorcycle. The court stated that it was "very skeptical" of an approach that would allow police to use deadly force to end vehicular pursuits in all circumstances, because "not every fleeing suspect poses a grave danger." 17 F.3d at 951. In both *Vaughan* and *Donovan*, unlike in this case, the suspects already were driving in a dangerous manner without regard for the safety of others. But in those cases, that danger was held to be insufficient to justify deadly force.

None of the cases decided by our sister circuits and cited by the dissent even remotely supports a holding in this case that Brosseau was justified in using deadly force. Unlike the dissent, we believe that there is a manifest difference between swerving at cars while driving at ninety miles per hour and then smashing a patrol car with an officer standing next to it, *see Smith*, 954 F.2d at 347-48; driving an eighteen-wheel truck at ninety miles per hour through heavy traffic, *see Cole*, 993 F.2d at 1330-31; leading a twenty-minute chase at 100 miles per hour and attempting to run down an officer, *see Scott,* 205 F.3d at 877-78; and driving at high speeds on the wrong side of the road with headlights off and accelerating toward a patrol car, *see Pace*, 283 F.3d at 1281-82, on one hand; and getting into a vehicle and fleeing, or preparing to flee, on the other.

To the extent that the dissent looks to the particular facts of this case rather than to the general danger of police chases, it does not view the evidence in the light most favorable to Haugen, as we are required to do on summary judgment. For example, to portray Haugen as violent and therefore dangerous, the dissent asserts that he was engaged in a "violent brawl" when Brosseau arrived on the scene. Dissent at 17089. By all accounts, however, Haugen was on the receiving end of the violence. Tamburello stated, "[W]hen he seen me he started to run. . . . And I ran over and grabbed him. Got into a little scuffle there. . . . I was on top of him on the ground." Atwood, Tamburello's companion, stated that when Tamburello caught Haugen, he "squirmed a little bit. Tried to get away. You know, he begged him, didn't want to go[.]" Nocera, Haugen's girlfriend, stated that Tamburello "ran up and tackled Ken to the ground," and "continued to pounce on him out here by the [car]." Moreover, the "brawl" (if that is what it was) was finished before Brosseau arrived.

Further, to exaggerate the danger of Haugen's escape, the dissent stresses that Haugen had to escape through a "narrow passageway" and a dangerous "obstacle course." Dissent at 17093-94. Haugen said that he was in a "small, tight space" that was "not like a parking lot," but that the driveway was twenty feet wide, giving him "plenty of room" and a "clear, straight shot" to get to the street. The photographs of the scene show that Haugen had more than enough room to escape without hitting anything or anyone. Indeed, he was able to drive away safely even after Brosseau shot him.

Finally, the dissent characterizes Haugen as "deranged" and "wild," dissent at 17093, 17098, but this

characterization is not supported by the record. Brosseau stated that she held her handgun to Haugen's temple, that he yelled "you're gonna have to fuckin kill me." But her version of the facts is contradicted by Haugen's version of the facts and by the other witnesses, who saw and heard no such thing. The dissent also asserts that Haugen was behaving "suicidally," dissent at 17090, but there is no indication in the record that Haugen intended to harm himself. (Of course, on the dissent's view, fleeing from police in a vehicle was itself suicidal since the police could shoot to kill.)

e. Fourth Amendment Conclusion

Based on the foregoing, we conclude that there is insufficient objective evidence in the record to grant Brosseau's summary judgment motion. Taken in the light most favorable to Haugen, the objective evidence, examined in light of the totality of circumstances surrounding this case and evaluated as of the time Brosseau actually fired her gun, does not support a conclusion as a matter of law that Brosseau had "probable cause to believe that [Haugen] pose[d] a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. We therefore conclude a reasonable jury could conclude, based on this evidence, that Brosseau's conduct violated Haugen's Fourth Amendment right. *See Katz*, 533 U.S. at 201.

2. Qualified Immunity

Having determined that "a violation could be made out on a favorable view of [Haugen's] submissions," *id.*, we must next decide whether Brosseau is nonetheless entitled

to qualified immunity. She is not entitled to immunity if the Fourth Amendment right at issue was clearly established. *See id.* For a right to be clearly established, it must be defined with sufficient specificity that a reasonable officer would have known she was violating it.

In some situations, the Fourth Amendment's general prohibition against excessive force may not be sufficiently specific to put an officer on notice of what conduct is allowed and what is not:

> [T]here is no doubt that *Graham v. Connor* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Id. at 201-02 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, if Brosseau made a reasonable mistake about what the law requires, she is immune from suit. *See id.* at 205.

On the other hand, state officials are not entitled to qualified immunity simply because no case with materially similar facts has held their conduct unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir. 2003). The standard is one of fair warning: where the contours of the right have been defined with sufficient specificity that a state official had fair warning that her

conduct deprived a victim of his rights, she is not entitled to qualified immunity. *See Pelzer*, 536 U.S. at 740 & n.10.

Beyond the general proposition that excessive force is unconstitutional, the Supreme Court in *Garner* articulated a "special rule" governing the use of deadly force. *See Monroe v. City of Phoenix*, 248 F.3d 851, 860 (9th Cir. 2001). Under *Garner,* deadly force is only permissible where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." 471 U.S. at 11. *See, e.g., Harris*, 126 F.3d at 1202 (holding that the FBI agent in the Ruby Ridge civil case was not entitled to qualified immunity); *Curnow,* 952 F.2d at 324-25 (holding that officers were not entitled to qualified immunity where they shot a suspect who possessed a gun but was not pointing it at the officers and was not facing the officers when they shot).

The doctrine of qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force." *Katz*, 533 U.S. at 206. Officers are not liable when they err in borderline cases. *See Deorle*, 272 F.3d at 1285. But the evidence here, when taken in the light most favorable to Haugen, does not present a borderline case. Viewing the evidence in Haugen's favor, Brosseau shot Haugen in the back even though he had not committed any crime indicating that he posed a significant threat of serious physical harm; even though Brosseau had no objectively reasonable evidence that Haugen had a gun or other weapon; even though Haugen had not started to drive his vehicle; and even though Haugen had a clear path of escape. Viewing the evidence in Haugen's favor, there is insufficient objective evidence to support Brosseau's stated concern that, at the time she shot him, Haugen posed a significant risk to

police officers or others in the area. We therefore conclude that Brosseau's mistake about the requirements of the Fourth Amendment was unreasonable, and that she had "'fair warning' that [her] conduct deprived [Haugen] of a constitutional right." *Pelzer*, 536 U.S. at 740.

We are mindful that police officers are called upon "to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. We must judge Officer Brosseau's action at the time she decided to shoot, and we must give her leeway to make reasonable mistakes.

But we are also mindful of the grave threat to constitutional rights that is present when government officials use deadly force against citizens. "[W]hile giving due deference to difficult judgment calls made on the street, we also must insure the rights of citizens, even fleeing felons, to be free from unreasonable seizures." *Donovan*, 17 F.3d at 951. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9. "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion." *Id.* at 10. It was for that reason that the Supreme Court in *Garner* held that deadly force may not be used simply because a felony suspect is successfully evading arrest. Viewing the evidence in Haugen's favor, Brosseau's use of deadly force was a clear violation of *Garner,* and consequently she is not entitled to summary judgment based on qualified immunity.

B. Fourth Amendment Claims Against the City and Police Department

In addition to suing Officer Brosseau, Haugen also sued the City of Puyallup and the Puyallup Police Department. Municipalities are "persons" subject to suit under 42 U.S.C. § 1983. *See Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 691 n.55 (1978). Municipalities cannot be held liable under a traditional *respondeat superior* theory. Rather, they may be held liable only when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

Haugen's complaint did not allege, and he has not argued to us on appeal, that Brosseau was acting pursuant to any preexisting policy when she shot him. Rather, he contends that the city and the police department are at fault because they failed to discipline Brosseau after the shooting. Haugen cannot, of course, argue that the municipality's later action (or inaction) caused the earlier shooting. Haugen argues instead that the city and police department should be held liable because they "ratified" Brosseau's decision to use deadly force.

The ratification doctrine, asserted as a basis for municipal liability, originated in *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). There, a plurality of the Supreme Court stated that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127. But the sentence from *Praprotnik* must be read in context. The Court held in *Praprotnik* that to establish municipal liability, a plaintiff must "prove[ ] the existence of an unconstitutional municipal policy." *Id.* at 128. A single decision by a municipal policymaker "may be sufficient to trigger section

1983 liability under *Monell*, even though the decision is not intended to govern future situations," *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)), but the plaintiff must show that the triggering decision was the product of a "conscious, affirmative choice" to ratify the conduct in question. *Gillette*, 979 F.2d at 1347. In the present case, Haugen has made no such showing.

Although some municipal pronouncements ratifying a subordinate's action could be tantamount to the announcement or confirmation of a policy for purposes of *Monell*, here there are no facts in the record that suggest that the single failure to discipline Haugen rises to the level of such a ratification. *See, e.g., Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) (refusing to hold that the "failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under *Monell*"). The City of Puyallup and the Puyallup Police Department are therefore entitled to summary judgment.

C. State Law Claims Against Brosseau

Haugen also sued Brosseau based on state law tort claims. Under Washington law,

> [i]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.

Wash. Rev. Code § 4.24.420 (2003). The district court dismissed Haugen's state law claims because, in its view,

Haugen was engaged in the commission of a felony when Brosseau shot him. Washington law provides that

> [a]ny driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

Id. § 46.61.024.

After being shot, Haugen drove away and, for a time, refused to stop for police. He ultimately pled guilty to a felony under § 46.61.024. But, as discussed in section A.1.c., *supra*, there is a disputed factual question about when Brosseau shot Haugen. Construing the facts in Haugen's favor, it appears that Brosseau may have shot Haugen before he had begun to "drive his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others." *Id.* It therefore is not clear that he "was engaged in the commission of a felony *at the time of the occurrence* causing the injury" or that his felony "was a proximate cause of" his injury. *Id.* § 4.24.420 (emphasis added). At this stage in the proceedings, it is not clear that Brosseau will have the benefit of the complete defense provided in § 4.24.420. We therefore reverse the district court's grant of summary judgment on Haugen's state law tort claims.

Conclusion

For the foregoing reasons, we REVERSE the district court's grant of summary judgment on Haugen's § 1983 claim against Brosseau. We AFFIRM the district court's grant of summary judgment on Haugen's § 1983 claims against the City of Puyallup and the Puyallup Police Department. We REVERSE the district court's grant of summary judgment on Haugen's state law claims against Brosseau. We REMAND for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED. Costs to Haugen on his appeal relevant to Brosseau. Costs to the City of Puyallup and the Puyallup Police Department.

REINHARDT, Circuit Judge, concurring:

I join fully in Judge Fletcher's opinion for the court, on the understanding that officers may not use deadly force against an otherwise nondangerous felony suspect simply because a chase of that suspect, high-speed or otherwise, would become or does become dangerous. Rather, as I understand the controlling law, if a high-speed chase of a nondangerous felony suspect would be, or becomes, dangerous, the officers must terminate the chase. In other words, the chase itself cannot create the danger that justifies shooting a suspect who, under *Garner*, may not otherwise be shot. I do not understand the out-of-circuit cases discussed in Judge Fletcher's excellent opinion and in the dissent to hold otherwise.

GOULD, Circuit Judge, dissenting:

I cannot accept the majority's conclusion that Haugen, a visibly disturbed felon willing to do almost anything to avoid capture, did not pose "a significant threat of death or serious physical injury" to others when he attempted a high-speed vehicular flight from police through a suburban residential neighborhood on a Sunday afternoon. Nor can I accept the majority's implicit suggestion that – because police can reduce the danger of a high-speed chase by letting a felon escape – police may never use deadly force to protect the public from the danger posed by a felon's reckless flight from police in a vehicle. The majority's sweeping position, which promises an easy escape to any felon willing to threaten innocent lives by driving recklessly, is indefensible as a matter of law and policy, and it conflicts with our sister circuits' holdings that police officers do not violate the Fourth Amendment by using deadly force to stop a fleeing felon who appears likely to drive an automobile with willful disregard for the lives of others.[1] The majority opinion creates a new obstacle to effective law enforcement in the western United States. It threatens the innocent to protect the guilty.

I

Under *Tennessee v. Garner*, 471 U.S. 1 (1985), the reasonableness of Officer Brosseau's conduct under the Fourth Amendment depends on (1) whether she had probable cause to believe that Haugen's fleeing the scene

[1] As I explain below, the majority creates a circuit split, departing from the holdings of the Sixth, Eighth, and Eleventh Circuits.

in his car would pose "a significant threat of death or serious physical injury" to others and (2) whether deadly force was necessary to prevent Haugen's escape. *Id.* at 3. Officer Brosseau's conduct was reasonable under the *Garner* standard.

Viewing the evidence in the light most favorable to Haugen, as we must at this stage,[2] Officer Brosseau had probable cause to believe that Haugen's fleeing the scene in his car would pose a significant threat of serious harm to others. Haugen was a desperate man capable of desperate measures. Haugen was a felony suspect who, when Officer Brosseau arrived on the scene, was engaged in a violent brawl with two other men.[3] Haugen defied

[2] This is because the district court granted summary judgment to Officer Brosseau.

[3] In an attempt to portray Haugen as appearing peaceful, the majority states that, "[b]y *all accounts*, . . . Haugen was on the receiving end of the violence. . . . [and] the 'brawl' . . . was finished when Brosseau arrived." *See supra* at 10611 (emphasis added). The majority omits *Haugen's account* in his deposition, in which he admitted to engaging in acts of violence. Haugen stated that he and his adversary "got into a wrestling thing." Haugen then stated that, just after Officer Brosseau arrived on the scene, he "elbowed Atwood and went for the keys in his truck." Haugen continued, "[T]he police pulled up. [Atwood and Tamburello] were distracted. I elbowed [Atwood] the rest of the way out of the car and got away from him."

In any event, it does not matter whether Haugen or his adversaries were the initial aggressors in their combat. What matters is Officer Brosseau's "contemporaneous knowledge of the facts," *see Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001), and Officer Brosseau knew only that Haugen was engaged in a violent brawl when she arrived on the scene. It is undisputed that Officer Brosseau received a radio dispatch stating that there was a "fight in progress" and that "[t]wo men were fighting on the ground." Officer Brosseau was entitled to consider the fact that Haugen had been fighting as one factor in

(Continued on following page)

Brosseau's orders to stop; he ignored her brandishing a gun at close range; he ignored her beating his car window with the butt of her gun; he ignored her shattering his car window; he ignored her striking him in the head with the butt of her gun; he ignored her attempts to grab his keys. Haugen was behaving wildly, even suicidally (defying an officer brandishing a gun at close range), and Officer Brosseau had probable cause to believe that Haugen would do almost anything to avoid capture. *See Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994) (from the vantage of an officer confronting a dangerous suspect, "a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death").[4] As Haugen admitted in his deposition, he attempted a high-speed vehicular flight through suburban streets. Haugen admitted that he drove

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assessing Haugen's potential dangerousness, and the majority errs by dismissing it.

[4] The majority states that Officer Brosseau was not motivated by a desire to protect the community from Haugen's likely erratic driving. This is false. In Officer Brosseau's tape-recorded police department interview, Brosseau stated that she shot Haugen "to protect my fellow officers *and the community* from an eminent [sic] danger." (emphasis added). She then stated that she was concerned for "pedestrians and officers *and residents in the area.*" (emphasis added). In her written statement, Officer Brosseau stated,

> During my encounter with Haugen it was obvious that he was in a wholly unstable frame of mind. He did not exhibit any regard for his own life. I considered Haugen an immediate danger *to all around him* and made every attempt to stop him.

(emphasis added). Officer Brosseau's expressed concerns were to protect the community, the residents in the area, and all those around Haugen. She did not, as the majority implies, limit her concern to people in the immediate area.

as fast as he could when he left the driveway, that he drove through the residential streets as fast as his car would go in third gear, and that he would have driven faster if the bullet wound had not made it difficult for him to shift gears. Haugen later pled guilty to the felony of "eluding," admitting he drove his vehicle "in a manner indicating a wanton or willful disregard for the lives or property of others." Wash. Rev. Code § 46.61.024. That Haugen, by his own admission, drove his car in a manner indicating "a wanton or willful disregard for the lives . . . of others" is powerful evidence of the reasonableness of Officer Brosseau's earlier belief that he would pose a significant threat of serious harm to others if permitted to escape.

A criminal suspect's fleeing from police in an automobile is inherently dangerous. The National Highway Traffic Safety Administration reports that 314 people were killed during police pursuits in 1998, the last year for which I can find a record.[5] National Highway Traffic Safety Administration, Fatality Analysis Reporting System – ARF, *Fatalities in Crashes Involving Law Enforcement in Pursuit 1998* (2000). Of that total, two were police officers, 198 were fleeing criminal suspects, and 114 were

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[5] Though these statistics demonstrate that felons fleeing from police in automobiles put the public at serious risk of death or injury, the statistics almost certainly understate the extent of the danger, due to the lack of a mandatory reporting system. John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, Law Enforcement Bulletin 14 (July 2002) ("Even conservative estimates by various researchers recalculate the actual number of fatalities between 400 to 500 deaths per year.").

innocent bystanders. *Id.* Presumably, many more high-speed pursuits result in serious injuries.[6]

The annals of law are filled with stories of police chases with tragic ends. In *City of El Centro v. United States*, a driver fleeing from police flipped his van, leading to an explosion that killed him and two passengers and that injured another fourteen passengers. 922 F.2d 816, 818 (Fed. Cir. 1990). In *Mays v. City of E. St. Louis, Ill.*, a driver fleeing from police ran into a cement barrier, killing one passenger and severely injuring eight others. 123 F.3d 999, 1000 (7th Cir. 1997). In *Roach v. City of Fredericktown*, a driver fleeing from police lost control of his car and collided with an oncoming car, killing himself and seriously injuring others. 882 F.2d 294, 295 (8th Cir. 1989). In *Helseth v. Burch*, a driver fleeing from police ran a red light and collided with a pickup truck, killing the truck's passenger, rendering the truck's driver a quadripelegic,

[6] The majority faults me for citing these official government statistics, arguing that the Supreme Court in *Garner* rejected "this kind of general statistical approach." *Supra* at 17076. The majority misrepresents my analysis. I do not, as the majority says, rely solely on statistics to support my view that Officer Brosseau was entitled to use deadly force. Rather, I rely on the objective circumstances – most notably Haugen's wild behavior immediately before he sped away in his jeep – that demonstrated to observers that Haugen was about to drive with willful disregard for the lives of others. My analysis does not depend on the government statistics, which I cite merely to emphasize the reasonableness of Officer Brosseau's decision to use deadly force and the important consequences to our society if Officer Brosseau's appropriate conduct is condemned.

Moreover, my use of statistics is consistent with the Supreme Court's use of statistics in *Garner*. *See* 471 U.S. at 21 (relying on a Bureau of Justice Statistics report to support the conclusion that "burglaries only rarely involve physical violence.").

and seriously injuring three children in his own car. 258 F.3d 867, 869 (8th Cir. 2001) (en banc). In *Mason v. Bitton*, a driver fleeing from police lost control of his car, crossed a median, and collided with an oncoming car, killing the occupants of both cars. 534 P.2d 1360, 1361-62 (Wash. 1975). These judicial decisions tell the tragic stories of only a few deadly police chases. There have been thousands more in the past. And there will be thousands more in the future, particularly if the majority's view prevails, deterring law enforcement from protecting the public.

I do not suggest that police marksmen may fire at will upon any felon fleeing in an automobile, merely because the felon is leaving the scene of a crime or because the felon has violated traffic laws.[7] Rather, I suggest that where police have probable cause to believe a fleeing felon will drive with willful disregard for the lives of others, the Supreme Court's *Garner* decision permits officers to use

[7] The majority thus mischaracterizes my analysis as "an approach that would allow officers to shoot a suspect simply because he is fleeing, or is about to flee, in a vehicle." *Supra* at 17076. Contrary to the majority's mischaracterization, I would hold that deadly force is reasonable only when it appears that a fleeing felon will drive with willful disregard for the lives of others. Here, Haugen's wild and defiant actions (which included disobeying a police officer brandishing a gun at close range) prior to fleeing in his vehicle plainly indicated that he would take any steps necessary to avoid capture, including driving with willful disregard for the lives of others, which Haugen – by his own admission – subsequently did. As Officer Brosseau stated,

> During my encounter with Haugen it was obvious that he was in a wholly unstable frame of mind. He did not exhibit any regard for his own life. I considered Haugen an immediate danger to all around him and made every attempt to stop him.

deadly force when necessary to protect the public. Officer Brosseau plainly had such probable cause here.

Officer Brosseau was concerned not only with the real possibility that Haugen might cause serious injury or even a fatality if she permitted him to speed through the neighborhood in his car. Brosseau also was concerned with the imminent possibility that Haugen might injure someone on the scene. Photographs in the record show that Haugen "peeled out" (he accelerated, leaving visible skid marks) of a driveway blocked on three sides by houses and a garage. Directly in Haugen's path were parked vehicles containing four persons, including a young child. Only by driving through this narrow passageway,[8] around the corner of a neighbor's house, and across a neighbor's lawn (a maneuver Haugen admitted he executed while accelerating "as quickly as [he] could") did Haugen avoid the cars. Brosseau was right to worry that Haugen, if permitted to speed through this obstacle course, would seriously injure the innocent bystanders or one of the police officers Brosseau believed were running toward the scene on foot to assist her.

The first prong of the Supreme Court's *Garner* test is met. Not only was Haugen fleeing in a 3,000 pound vehicle, but also he was behaving in a manner that suggested he would drive with reckless disregard for the lives of others (as he subsequently did). Presented with a desperate man taking desperate measures in a deadly machine, Officer Brosseau reasonably concluded that Haugen posed

[8] Haugen in his deposition described this passageway as a "small, tight space."

a significant threat of serious harm to the community. *See United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) ("It is indisputed that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon.") (per curiam).

The second prong of the *Garner* test also is met, because deadly force was necessary to prevent Haugen from escaping. Deadly force is not necessary where there exists a less drastic alternative that is "reasonably likely to lead to apprehension before the suspect can cause further harm." *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997). Here, Officer Brosseau attempted several less drastic alternative means of subduing Haugen before shooting him. She called several other officers and a police dog to scour the neighborhood for him. She ordered him to freeze as he ran to his car. She chased him. She ordered him to open the door and to get out of his car. She brandished her gun – effectively warning him that he must relent or be shot. She smashed his driver's side window. She beat his head with the butt of her gun. She tried to take his keys. Only after Officer Brosseau had attempted several less drastic alternatives – alternatives that failed to subdue Haugen – did she resort to the extreme step of shooting Haugen.

Haugen urges that a less drastic alternative would have been for Officer Brosseau to permit him to flee in his car. Haugen urges that officers would have been able to capture him another time. However, Haugen fails to recognize the costs to society of allowing felons to flee without constraint. And Haugen fails to explain by what method those officers would have subdued him "*before [he could] cause further harm,*" as our *Forrett* decision (and common sense) requires. 112 F.3d at 420 (emphasis

added). Haugen's reckless departure threatened the safety of people on the scene. His racing through the streets threatened the safety of people in the neighborhood. Research indicates that vehicular flights from police become dangerous very quickly. Fifty percent of all collisions occur in the first two minutes of police pursuit, and more than 70 percent of all collisions occur before the sixth minute of the pursuit. G.P. Alpert, U.S. Department of Justice, National Institute of Justice, *Pursuit Management Task Force Report* (1998). Officer Brosseau correctly decided that waiting was not an option under the circumstances.[9]

Even if permitting Haugen to race away in his automobile *were* a reasonable alternative, we cannot properly

[9] The author of the majority opinion at oral argument asked defense counsel whether Officer Brosseau should have shot Haugen's tires to disable his vehicle. Though the majority opinion does not now rely on this as a possible alternative to the use of deadly force, it is perhaps helpful to explain why shooting Haugen's tires likely would not have been an appropriate or effective tactic to end the threat Haugen posed. Shooting Haugen's tires may not have disabled his car. Haugen still could have escaped – and endangered others – by driving with a flattened tire or two. More importantly, Officer Brosseau would have endangered herself and others had she shot at Haugen's tires. Police ammunition is designed to disable human beings, not to disable automobiles. Had Officer Brosseau fired at Haugen's tires at close range, her bullets might have ricocheted, killing or injuring her or an innocent bystander. Even if Officer Brosseau's bullets penetrated a tire, the bullets would not necessarily have come harmlessly to rest. The bullets could have continued their trajectory, ricocheting off the ground or automobile, killing or injuring the innocent. *See* Rick Parent, *When Police Shoot*, Police Magazine, Oct. 2000 ("Unlike the scenes depicted by 'Hollywood,' the 'shooting out of a tire' can be a precarious and dangerous event."). Officer Brosseau was wise not to shoot Haugen's tires. This "alternative" was no alternative at all.

fault Officer Brosseau for not thinking of it in the heat of the moment. Judges must allow "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). We must judge Officer Brosseau's conduct from the perspective of a reasonable officer on the scene, not from the perspective of a judge in his or her chambers. *Id.* The majority effectively ignores this command from the Supreme Court, measuring Officer Brosseau's conduct not against the standard of a reasonable officer on the scene, but against the standard of its own inexpert judgment as to what Officer Brosseau should have done under the circumstances.

In sum, I would hold that Officer Brosseau had probable cause to believe that Haugen's leading police on a reckless high-speed car chase through a residential neighborhood would pose a significant threat of serious harm to the community and that the use of deadly force was necessary to prevent his escape. I would hold that Officer Brosseau's shooting of Haugen did not violate Haugen's Fourth Amendment rights.

The majority's contrary holding is objectionable not only because it flouts the Supreme Court's *Garner* standard, but also because it creates a circuit split. The Sixth, Eighth, and Eleventh Circuits all have held, as I would hold, that officers are justified in using deadly force when a fleeing felon appears likely to drive with willful disregard for the lives of others. *See Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (holding that police reasonably shot a felon fleeing in an automobile when his reckless driving posed an immediate threat to the safety of officers

and innocent civilians); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (holding that police reasonably shot a misdemeanant fleeing in an automobile when he posed a threat to officers at a police roadblock and appeared likely to "do almost anything to avoid capture"); *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (holding that police reasonably shot a criminal fleeing in a truck when he posed a threat to travelers driving on a crowded interstate highway); *Pace v. Capobianco*, 283 F.3d 1275, 1281 (11th Cir. 2002) (holding that police reasonably shot a felon fleeing in an automobile when he appeared likely to continue using his vehicle aggressively during a police pursuit).

Contrary to the holdings of every circuit to consider analogous issues, the majority holds that an officer violates a fleeing felon's Fourth Amendment rights by using deadly force to prevent a dangerous vehicular flight; it appears that the majority believes that officers can reduce the danger of a highspeed chase by forgoing it.[10] The majority believes that police officers should permit felons

[10] More candid than the majority opinion, Judge Reinhardt's separate concurring opinion restates the majority's holding in explicit terms. The concurring opinion states, "I join fully in Judge Fletcher's opinion for the court, on the understanding that officers may not use deadly force against an otherwise nondangerous felony suspect simply because a chase of that suspect, high-speed or otherwise, would become or does become dangerous. Rather, as I understand the controlling law, if a high-speed chase of a nondangerous felony suspect would be, or becomes, dangerous, the officers must terminate the chase. In other words, the chase itself cannot create the danger that justifies shooting a suspect. . . . " *Supra* at 17088. The majority opinion never disavows Judge Reinhardt's separately stated view, which, in any event, animates the majority opinion's analysis.

to speed away unpursued rather than attempt to stop them. *Supra* at 17073 ("[Officers] could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely."); *id.* at 17076 ("[A]n officer must sometimes forego or discontinue deadly force and allow a suspect to escape.")." The majority slights the important law enforcement interests in pursuing fleeing felons. *See, e.g., Donovan v. City of Milwaukee*, 17 F.3d 944, 951 (7th Cir. 1994) ("Police officers may, *and ought to*, pursue fleeing suspects, and where those suspects present 'a threat of serious physical harm, either to the officer[s] or others, it is not constitutionally unreasonable to prevent escape by using deadly force.'") (emphasis added). The majority neglects the fact that if police are forbidden to pursue, then many more suspects will flee – and successful flights not only will reduce the number of crimes solved but also will create serious risks for passengers and bystanders. *See Mays v. City of E. St. Louis*, 123 F.3d 999, 1003 (7th Cir. 1997). Moreover, the majority errs by putting the onus on *police* to end the pursuit by letting the felon escape, rather than on the fleeing *felon*, who at all times has the power to avoid injury to himself and others by halting as the law requires. *See id.* at 1004 (holding that a police officer's pursuit of a fleeing felon in an automobile played a "causal role" in an ensuing wreck, "but not the ***kind*** of cause the law recognizes as culpable. . . . [A] criminal's effort to shift the blame [to police] . . . is not one that any legal system can accept."). There are several problems with the majority's reasoning.

First, the majority implies, contrary to the record evidence, that Haugen would have driven safely and carefully away from the scene if he had not been followed by police squad cars. But it is unrealistic to conclude that

Haugen, a deranged and defiant felon, would suddenly have been transformed into a model citizen and careful driver the moment he drove away from the scene and did not hear police sirens in pursuit. And even if Officer Brosseau had believed that her fellow officers would not pursue Haugen's vehicle, Brosseau still would have had probable cause to believe that Haugen would speed away from the scene with willful and wanton disregard for others' safety. Indeed, even *before* the police squad cars gave chase, Haugen was, by his own admission, "standing on the gas" in the driveway, accelerating "as quickly as [he] could," within a "small, tight space," a fact that confirms the reasonableness of Officer Brosseau's earlier concern about others' safety.

Second, the majority implies (with no basis in the record) that Washington law or Puyallup Police Department policy prohibited (or, at least, discouraged) Officer Brosseau's fellow officers from pursuing Haugen in their squad cars. Although police officers in Washington may have to compensate a person who is injured by police officers' negligent conduct while pursuing a fleeing felon, *Mason v. Bitton*, 534 P.2d 1360, 1363 (Wash. 1975), Washington law does not prohibit police from pursuing a fleeing felon in a vehicle. So the majority errs by effectively holding that Officer Brosseau was required to assume that her fellow officers would not chase Haugen in their squad cars and that Haugen would drive away carefully, safely, and unpursued.

Third, Officer Brosseau's fellow officers *in fact* chased Haugen in their squad cars, so Officer Brosseau was correct in assuming that a police pursuit would occur. Officer Brosseau was entitled to consider the potential

danger of that police pursuit in assessing the danger Haugen posed to others.

The majority apparently prefers, as a matter of policy, that police departments discourage their officers from pursuing felons in automobiles. If the majority had its way in setting law enforcement policy, no police officer ever would pursue a felon at high speed; the police would surrender, rather than the felon, who would be given a free pass to an easy escape. In my view, the majority errs by allowing its policy preference to corrupt its analysis of the danger Haugen posed to the community by fleeing in a vehicle in a deranged mental state.

Having created a circuit split by misapplying *Garner*, the majority downplays its departure from our sister circuits' decisions by urging that those decisions approved of deadly force in circumstances very different from those presented here. Although every case presents unique facts, the facts in our sister circuits' decisions are similar to the facts here in important respects. In the Sixth, Eighth, and Eleventh Circuit cases, as in this case, a suspect was fleeing from police in an automobile, a machine that can be extremely dangerous when not operated with great care and due regard for the public safety. *See Scott*, 205 F.3d at 871-72; *Smith*, 954 F.2d at 344; *Cole*, 993 F.2d at 1330; *Pace*, 283 F.3d at 1277. In those cases, as in this case, the felon refused orders to halt. *See Scott*, 205 F.3d at 871; *Smith*, 954 F.2d at 344; *Cole*, 993 F.2d at 1330; *Pace*, 283 F.3d at 1277. In those cases, as in this case, the felon was behaving in a desperate and unstable manner. *See Scott*, 205 F.3d at 872; *Smith*, 954 F.2d at 344; *Cole*, 993 F.2d at 1330-31; *Pace*, 283 F.3d at 1277-78. In those cases, as in this case, the felon appeared likely to take extreme steps to avoid capture. *See Scott*, 205 F.3d at 872; *Smith*, 954

F.2d at 344; *Cole*, 993 F.2d at 1331; *Pace*, 283 F.3d at 1277-78. Most importantly, in those cases, as in this case, the felon appeared likely to drive with willful disregard for the lives of others. *See Scott*, 205 F.3d at 872; *Smith*, 954 F.2d at 344; *Cole*, 993 F.2d at 1330-31; *Pace*, 283 F.3d at 1277-78.[11]

The majority attempts to distinguish our sister circuits' holdings on the ground that police in those cases used deadly force to *end* a dangerous high-speed flight, rather than to prevent a dangerous high-speed flight from commencing. But our sister circuits did not, as the majority implies, require that police officers wait until *after* a suspect has endangered the lives of others before using deadly force. Nor could they have so held. The Supreme Court's *Garner* decision requires courts to determine whether officers have probable cause to believe a suspect will pose a threat of serious physical harm *in the future*, not whether the suspect posed such a danger *in the past*. *See Garner*, 471 U.S. at 11-12.

At the time Officer Brosseau shot Haugen, Haugen's vehicle had not yet begun to move. But an objective observer would have reasonably concluded that Haugen was embarking on a desperate, potentially deadly, high-speed vehicular flight through residential neighborhoods.

[11] It is worth noting that the suspects in *Scott*, *Smith*, *Cole*, and *Pace* were suspected of crimes less serious and less dangerous than the burglary and battery of which Haugen was suspected. *See Scott*, 205 F.3d at 871 (suspect ignored a traffic sign); *Smith*, 954 F.2d at 344 (suspect ran a stop sign); *Cole*, 993 F.2d at 1330 (suspect drove through toll booth without paying); *Pace*, 283 F.3d at 1276 (suspect driving at night without headlights).

That Haugen was only beginning to execute his plan of driving with willful and wanton disregard for the lives of the innocent does not mean, as the majority suggests, that Haugen did not pose a "significant threat of death or serious physical injury" to others. Nothing requires a police officer, like some modern-day Epimetheus, to disregard prospective danger and attend only to dangers that have passed. It was good that Brosseau acted when she did.

Contrary to the majority's suggestion, neither the Seventh Circuit's *Donovan* decision nor the Eleventh Circuit's *Vaughan v. Cox* decision lends support to the majority's novel holding. Both *Donovan* and *Vaughan* are consistent with my view – compelled by the Supreme Court's *Garner* decision – that police can use deadly force when necessary to stop a fleeing felon who appears likely to drive with willful disregard for the lives of others. In *Donovan*, the Seventh Circuit held that genuine issues of material fact existed as to whether deadly force was proper when "there [was] no evidence that [the suspect] imperiled anyone (except himself and his willing passenger) . . . [by] driving his motorcycle through empty city streets in the wee hours of the morning." 17 F.3d at 951. Here, by contrast, Haugen's own testimony – describing his attempted high-speed flight through a suburban residential neighborhood in his jeep on a Sunday afternoon – shows that Haugen's conduct would have imperiled many people, both on the scene and in the community, if Officer Brosseau had not reasonably intervened.

In *Vaughan*, the Eleventh Circuit held that genuine issues of material fact existed as to whether deadly force was proper when police shot without warning a fleeing suspect. 264 F.3d 1027, 1031, 1031 n.2 (11th Cir. 2001)

(vacated by 536 U.S. 953 (2002), reinstated and supplemented on remand at 316 F.3d 1210 (11th Cir. 2003)). Here, by contrast, it is undisputed that Officer Brosseau effectively warned Haugen that he would be shot if he did not submit to arrest.

Fourth Amendment analysis requires a delicate balancing of individual and societal interests, *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981), and an individual's interest in his or her life is of unmatched importance. But when a felon threatens innocent lives in a base attempt to escape responsibility for his or her crimes, police officers do not act unreasonably in using deadly force to protect the community. I would hold that Officer Brosseau did not violate Haugen's Fourth Amendment rights and that the district court properly granted summary judgment in her favor.

* * *

With perhaps the purpose, but certainly not the effect, of obscuring its departure from the Supreme Court's *Garner* standard and our sister circuits' precedents, the majority deploys an array of rhetorical devices that, individually and collectively, serve only to accentuate the weaknesses of the majority's rationale.

First, the majority implies that its holding is consistent with those of our sister circuits. But no other court has ever come close to holding, as the majority holds today, that police may never use deadly force to protect the public from the danger posed by a felon's reckless flight from police in a vehicle. *See Scott*, 205 F.3d at 877 (holding that police reasonably used deadly force to stop a suspect fleeing in a vehicle); *Smith*, 954 F.2d at 347-48 (same); *Cole*, 993 F.2d at 1330-33 (same); *Pace*, 283 F.3d at 1281

(same). Second, the majority implies that police officers' decision to pursue Haugen in their police cruisers was of dubious legality under Washington law. But it was not; such chases are permissible, though they must be conducted with due care. *See Mason*, 534 P.2d at 1363. Third, the majority states that we cannot properly take judicial notice of the official government statistics I cited to emphasize the dangerousness of high-speed flights by felons from police. But this is incorrect. *See, e.g., Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924) (Holmes, J.) ("[T]he Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law. . . ."). Fourth, the majority states that the Supreme Court in *Garner* rejected "[the dissent's] kind of general statistical approach." *See supra* at 17076. But I do not use any "general statistical approach," and, in any event, the Supreme Court used statistics in *Garner* in precisely the way I use them here. *See* 471 U.S. at 21. Fifth, the majority states that I do not view the facts in the light most favorable to Haugen. But I have relied only on facts Haugen does not dispute, facts that compel the conclusion that Haugen's fleeing in his vehicle would have posed a significant threat of death or serious physical injury to others.

The majority's artful phrasing and overwrought lucubrations should not and cannot obscure the majority's departure from the Supreme Court's and our sister circuits' law. Acting somewhat as a police commissar for the western states and territories in our jurisdiction, rather than as a constitutional court, the majority imposes serious and unworkable restrictions on police officers' efforts to bring criminals to justice and to protect the community. I cannot join the majority in that effort.

II

The majority's holding that Officer Brosseau violated Haugen's rights is wrong. But it is not *as wrong* as the majority's holding that those rights were "clearly established" at the time of the shooting. It should be undeniable that Officer Brosseau did not violate Haugen's "clearly established" rights and so was qualifiedly immune from suit.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). If "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," then qualified immunity does not apply. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). But if, on the other hand, "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

Officer Brosseau was not plainly incompetent.[12] Nor did she knowingly violate the law. Police officers of reasonable competence could disagree whether deadly force was justified.[13] In fact, federal appeals courts of reasonable competence *do* disagree on the issue.[14] And judges, unlike

[12] Rather, I would say Officer Brosseau is very competent.

[13] Indeed, the Puyallup Police Department Firearms Review Board concluded, after an investigation, that Officer Brosseau's actions did not violate Washington law or police department policy.

[14] The majority does not disagree only with my dissenting views. The majority also disagrees with the considered wisdom of the Sixth, Eighth, and Eleventh Circuits, which have held there was no Fourth Amendment violation in circumstances similar to those presented here. *See Scott,* 205 F.3d at 877; *Cole,* 993 F.2d at 1330-33; *Pace,* 283 F.3d at 1281.

police officers, have the luxury of studying the constitutional issues in the calm of their chambers, with the benefit of lawyers' briefing, and after hearing oral arguments. *See Ganwich v. Knapp*, 319 F.3d 1115, 1125 (9th Cir. 2003) ("[J]udges should not expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze Fourth Amendment developments with a law professor's precision.").

The majority holds Officer Brosseau to an unreasonable standard. Officer Brosseau should be commended, not condemned, for acting with courage and decisiveness to protect the public from a dangerous felon in a deranged mental state embarking on a potentially deadly flight from police. I respectfully dissent.[15]

[15] Despite my dissent, I do not disagree with Parts II.B. and II.C. of the majority opinion, affirming the district court's summary judgment in favor of the City of Puyallup and the Puyallup Police Department, and reversing the district court's dismissal of Haugen's state law claims. I disagree with Part II.A., the majority's Fourth Amendment analysis.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH J. HAUGEN,

Plaintiff-Appellant,

v.

ROCHELLE BROSSEAU; PUYALLUP POLICE DEPARTMENT; THE CITY OF PUYALLUP,

Defendants-Appellees.

No. 01-35954

D.C. No.
CV-01-05018-RJB

OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
March 4, 2003 – Seattle, Washington

Filed August 4, 2003

Before: Stephen Reinhardt, William A. Fletcher and Ronald M. Gould, Circuit Judges.

Opinion by Judge William A. Fletcher;
Concurrence by Judge Reinhardt;
Dissent by Judge Gould

COUNSEL

Randy W. Loun, Loun & Tyner Bremerton, Washington, for the plaintiff-appellant.

Mary Ann McConaughy, Keating Bucklin & McCormack, Seattle, Washington, for the defendants-appellees.

OPINION

WILLIAM W. FLETCHER, Circuit Judge:

On February 21, 1999, Officer Rochelle Brosseau of the Puyallup, Washington, Police Department shot Kenneth Haugen in the back as he tried to flee from police in his vehicle. Haugen filed a § 1983 suit in district court alleging a violation of his constitutional rights, and the court granted summary judgment to Brosseau. Construing the evidence in the light most favorable to Haugen, we inquire whether Brosseau's use of deadly force violated the Fourth Amendment and, if it did, whether she is entitled to qualified immunity. We conclude that the evidence, so construed, shows that Brosseau's conduct violated the Fourth Amendment, and, further, that her conduct violated clearly established law governing the use of deadly force as set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985). We therefore reverse the district court's grant of summary judgment.

I. Background

Kenneth Haugen and Glen Tamburello were in business together selling drugs and occasionally fixing cars. At some point, their relationship soured, and Haugen decided to dissolve the partnership. On February 20, 1999, he took some of his tools from Tamburello's shop. Tamburello wanted the tools back and wanted retribution. He went to the police station, and, in an interview with Officer Rochelle Brosseau, reported that Haugen had burglarized his shop. Tamburello also contacted the Riddles, neighbors of Haugen's mother, and requested that they call him should they see Haugen at his mother's house.

Haugen, his girlfriend Deanna Nocera, and Nocera's daughter went to Haugen's mother's residence the night of February 20, where they did some laundry and spent the night. The next morning, Haugen began to spray-paint his 1984 Jeep Cherokee in his mother's driveway. He had a warrant out for his arrest and apparently thought he might evade detection driving a yellow rather than a white Jeep. It was a windy morning, and the Riddles complained to Haugen that the spray paint was blowing into their yard. When Haugen refused to stop, the Riddles called Tamburello. Tamburello drove with Matt Atwood to Haugen's mother's house where they accosted Haugen. Haugen began to run away, but Tamburello caught him, threw him to the ground, and began to beat him up. Haugen and Nocera begged Tamburello to stop, and, after being persuaded by several punches, Haugen agreed to give the tools back. Tamburello and Atwood then forcibly led Haugen into the pickup and planned to drive to a storage facility where Haugen had stashed the tools, but Irene Riddle, having seen the brouhaha outside, had already dialed 911.

After her interview with Tamburello on February 20th, Officer Brosseau had learned that there was a felony no-bail warrant out for Haugen's arrest based on drug and other offenses. The next morning, while in the midst of a traffic stop nearby, Brosseau heard the report of the ruckus at Haugen's mother's house. She responded quickly, and when she arrived Tamburello and Atwood were in the process of getting Haugen into the pickup. Haugen took advantage of the distraction caused by Brosseau's arrival and broke away from his would-be captors. He ran up the driveway, past his mother's house, and into the backyard. Brosseau gave chase for only a few

steps and then called for back-up, including a K-9 unit to help locate Haugen. Over the next half hour or so, Brosseau and other officers interviewed the witnesses still at the scene and set up a containment perimeter for the search. To avoid interfering with the K-9's efforts to locate Haugen by scent, the officers instructed Tamburello and Atwood to remain in Tamburello's pickup and instructed Nocera and her daughter to remain in her Honda. The pickup was parked in the street in front of the driveway. The Honda was parked in the driveway in front of the Jeep. The Jeep was in the driveway facing the Honda and the street and was angled somewhat to the left.

Haugen, meanwhile, hid in various bushes and other locations around the neighborhood as he tried to watch what was happening at his mother's house. Apparently seeking help, Haugen knocked on the back door of Margaret Rounds, a neighbor who lived down the street. No one answered, so Haugen left. Rounds was at home and was aware of the situation outside because she had been listening to a police scanner, but she had no inclination to help Haugen. Instead, she called police and said that there was a man in her backyard. Brosseau and the two other officers on foot, Officers Subido and Pashon (with the K-9), ran to Rounds's backyard. Subido told Brosseau to circle around the front, and as Brosseau rounded the house, she saw Haugen about fifty feet ahead of her running toward his Jeep.

Haugen got into the Jeep and tried to start it. Brosseau ran to the Jeep with her handgun drawn and ordered him to stop. As Haugen fumbled with his keys, Brosseau hit the driver's side window several times with her handgun, and, on the third or fourth try, she broke the window. Brosseau had mace and a baton but did not use

them. Instead, she tried to reach in the car to grab the keys, but just after she broke through the window, Haugen succeeded in starting the Jeep. Either before Haugen pulled away, or just after he started to do so (the evidence is conflicting on this point), Brosseau shot him in the back. From Brosseau's position when she shot, Haugen was in front of her, and beyond Haugen were Nocera, Nocera's daughter, Tamburello, and Atwood. Brosseau said that she was "aware of the background exposure," but she nonetheless believed she had a safe shot because she thought the bullet would be stopped by the Jeep's engine block before reaching the bystanders. Because Haugen did not stop, Brosseau believed she had missed him, but Brosseau did not take a second shot because she thought the risk became too great as he began to drive away.

The bullet entered Haugen's back near the left shoulder blade and lodged in his chest. Despite the wound, Haugen managed, in his words, to "stand on the gas" and to drive out of the driveway, across the neighbor's yard, and onto the street. Photographs in the record show tire tracks on the driveway due to displacement of gravel. After Haugen escaped, some of the officers gave chase. Haugen's injury made it difficult for him to drive. Once he realized he had been shot, he used one hand to hold the wound and the other to drive. According to Haugen, he never got the Jeep past third gear and never drove faster than forty-five miles per hour. Before long, Haugen had difficulty breathing and pulled over to the side of the road, where he passed out. He was apprehended and taken to the hospital.

The precise circumstances of the shooting are disputed. In his deposition, Haugen testified that he believed the gun may have discharged accidentally while Brosseau

was reaching through the driver's window grappling with him. Brosseau, on the other hand, says she shot Haugen intentionally. According to Brosseau, she stepped back and away from the driver's window once the Jeep started moving and fired one shot through the rear side window on the driver's side.

When parties dispute the facts, we typically accept the non-moving party's version when ruling on a summary judgment motion. In this case, however, we accept Brosseau's statement that she shot Haugen intentionally. No gun shot residue was found on Haugen's clothes, and the forensic scientist determined that the bullet hit another object before it struck Haugen. Most tellingly, photos of Haugen's Jeep show a bullet hole in the rear side window. When asked about the bullet hole in the window, Haugen responded: "That's something I can't explain." The parties do not dispute that only one shot was fired. Because the evidence unmistakably indicates that Brosseau shot Haugen through the rear side window, we accept Brosseau's statement that she intentionally shot Haugen through that window rather than Haugen's speculation that the gun discharged accidentally inside the Jeep.

Haugen recovered from the gunshot and filed suit in district court under 42 U.S.C. § 1983 claiming that Brosseau, the Puyallup Police Department, and the City of Puyallup deprived him of his Fourth Amendment rights. He also alleged causes of action based on Washington tort law. The defendants moved for summary judgment, and the district court granted their motion. It held that, even if the shooting constituted excessive force under the Fourth Amendment, Brosseau had not violated a clearly established right and was therefore protected by qualified immunity. The district court also held that Haugen had

not pointed to any official practice that led to a constitutional violation, and so he could not pursue a suit against the police department or the City of Puyallup. Finally, the court held that Haugen could not pursue state tort claims because his injury occurred during the commission of a felony.

Haugen appealed. We review a grant of summary judgment de novo. *See Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir. 2002).

II. Discussion

A. Fourth Amendment Claim Against Brosseau

Officer Brosseau argues that she is entitled to qualified immunity from Haugen's Fourth Amendment claim. Following the Supreme Court's ruling in *Saucier v. Katz,* 533 U.S. 194 (2001), we undertake a two-step analysis when a defendant asserts qualified immunity in a motion for summary judgment. We first face "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If we determine that a constitutional right has been violated, we then move to the second step and "ask whether the right was clearly established" such that "it would be clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted." *Id.* at 201-02.

1. Fourth Amendment Right

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The

Supreme Court has held that the Fourth Amendment prohibits the use of excessive force by police in the course of apprehending suspected criminals. *See Graham v. Connor,* 490 U.S. 386, 394-95 (1989). In *Tennessee v. Garner,* 471 U.S. 1 (1985), the Supreme Court set forth the specific constitutional rule governing when police officers may use deadly force:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead . . . .
>
> . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12. Under *Garner,* deadly force cannot be justified based merely on a slight threat. An officer may not use deadly force "unless it is necessary to prevent the

escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3.

The application of *Garner* is clear in many cases. Where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force. *See, e.g., Billington v. Smith,* 292 F.3d 1177, 1185 (9th Cir. 2002) (holding that deadly force was justified where a suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun); *Reynolds v. County of San Diego,* 84 F.3d 1162, 1168 (9th Cir. 1996) (holding that deadly force was reasonable where a suspect, who had been behaving erratically, swung a knife at an officer); *Scott v. Henrich,* 39 F.3d 912, 914 (9th Cir. 1994) (suggesting that the use of deadly force is reasonable where a suspect points a gun at officers); *Garcia v. United States,* 826 F.2d 806, 812 (9th Cir. 1987) (holding that deadly force was reasonable where the decedent attacked an officer with a rock and stick).

On the other hand, the mere fact that a suspect possesses a weapon does not justify deadly force. *See, e.g., Harris v. Roderick,* 126 F.3d 1189, 1202 (9th Cir. 1997) (holding, in the Ruby Ridge civil case, that the FBI's directive to kill any armed adult male was constitutionally unreasonable even though a United States Marshal had already been shot and killed by one of the males); *Curnow v. Ridgecrest Police,* 952 F.2d 321, 324-25 (9th Cir. 1991) (holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot); *Ting v. United States,* 927 F.2d 1504, 1508-11 (9th Cir. 1991) (holding that deadly force was unreasonable where a suspect had dropped his gun).

In some circumstances, deadly force may be justified based on the nature of the crime committed by the fleeing suspect. *See, e.g., Forrett v. Richardson,* 112 F.3d 416, 420 (9th Cir. 1997) (holding that deadly force was reasonable where a fleeing suspect had shot a victim in the course of a burglary). But the prior commission of even a violent crime does not always justify deadly force. *See Harris,* 126 F.3d at 1203 ("The fact that [the suspect] had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight."); *Hopkins v. Andaya,* 958 F.2d 881, 887 (9th Cir. 1992) (holding that an officer's second use of deadly force was unreasonable even though the suspect had violently assaulted the officer a few minutes before; by the time of the second use of deadly force, the suspect was advancing toward the officer but was wounded and unarmed).

The parties dispute whether, under *Garner,* Officer Brosseau's use of deadly force was reasonable in the circumstances of this case. In a five-page type-written statement and in a lengthy tape-recorded police department interview, Brosseau described the episode and gave her reasons for using deadly force. First, Brosseau stated that, at the time she shot Haugen, she knew that he had a felony no-bail warrant outstanding for drug-related charges, and she had probable cause to believe that he had committed a burglary. Second, Brosseau stated that she saw Haugen reach below the seat of the Jeep, and that she thought he might be reaching for a weapon. Third, Brosseau stated that she believed Haugen would injure officers or other people in the area by fleeing in the Jeep. She said that he "was driving in an erratic manner," and that she shot him to prevent possible injury to others. We analyze Brosseau's stated reasons in turn.

a. Haugen's Prior Crimes

Brosseau stated that she knew of the warrant for Haugen's arrest and that she believed he had committed a burglary. Under *Garner,* the fact that Brosseau believed Haugen had committed drug crimes and a burglary is not sufficient to justify deadly force. In many deadly force cases, the plaintiff will have committed one or more crimes, but *Garner* and our circuit cases make clear that the mere commission of prior crimes does not justify the use of deadly force. In *Garner* itself, the fleeing suspect was a burglar. *See* 471 U.S. at 3-4. In *Ting,* the suspect was part of a major narcotics organization. *See* 927 F.2d at 1507-08. In *Curnow,* officers believed that the suspect had assaulted a woman. *See* 952 F.2d at 323. In *Andaya,* the suspect had just violently assaulted the officer. *See* 958 F.2d at 883-84. In *Harris,* the suspect had fired shots into the woods and may even have been the man who killed a United States Marshal. *See* 126 F.3d at 1193. In none of these cases, including *Garner,* did the suspect's crime justify the use of deadly force.

Here, Brosseau had reason to believe that Haugen had committed drug crimes and burglary. Drug crimes and burglary are serious offenses, but under *Garner* the critical question is whether the officer has "probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm." 471 U.S. at 11. Brosseau had no such probable cause.

b. Haugen's Potential Weapon

Officer Brosseau said she believed that Haugen might have a weapon in the car. When Haugen was running

toward the Jeep, Brosseau said that she thought he might be running for a weapon since he would not be running simply to hide there. When she first approached the Jeep, she said that he "reached down to an area on the floorboard in the middle of the front seat" and that she "thought he was reaching for a weapon." Once she broke the window, however, Brosseau saw that he had only keys in his hands. But moments later, just as he started the car, Brosseau said Haugen "dived forward as if to grab something on the floorboard again." Brosseau stated that she feared again that he might have a weapon, and that she therefore stepped back and away from the driver's window.

Brosseau admitted that at the time she shot Haugen, she was not worried that he would use any weapon against her. She had stepped back and away from him, and had positioned herself behind him, so that even if Haugen had had a gun he would not have had a clear shot. She said, however, that she feared if Haugen had a gun he might use it on some officers who might have approached the front of his car, or that he might use it against Tamburello or Atwood, "who he had cause to be unhappy with."

The factual predicate of Brosseau's stated reason is that Haugen dove forward as he started the car. But several other witnesses gave statements about what Haugen was doing in the car. None of these witnesses mentioned that Haugen dove forward, and none has offered any support for Brosseau's assertion that Haugen looked as if he might have been reaching for a weapon. Nor has Brosseau offered any other evidence to support her belief that Haugen might have had a gun. She did not see a gun in the car, and she had not received any reports that he might have one, or indeed that he had ever had one. Under Ninth Circuit precedent, the mere presence of

a weapon does not justify the use of deadly force, *see Harris,* 126 F.3d at 1202; *Curnow,* 952 F.2d at 324-25; *Ting,* 927 F.2d at 1508-11, let alone the *potential* presence of a weapon.

"[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford,* 272 F.3d 1272, 1281 (9th Cir. 2001). Movements by a suspect are not enough to justify deadly force if, in light of the relevant circumstances, those movements would not cause a reasonable officer to believe that the suspect was reaching for a weapon. In support of her stated fear that Haugen was reaching for a weapon, Brosseau has cited no objective factors other than her stated observation that he dove forward and appeared to be reaching for something. Construing all of the relevant facts and circumstances and drawing all reasonable inferences in Haugen's favor, as we must on a motion for summary judgment, we conclude that Brosseau has not demonstrated an objectively reasonable fear about a potential weapon that would justify her use of deadly force.

c. Impending Escape in a Vehicle

Finally, Brosseau asserted that she feared Haugen would injure officers or others when he tried to get away in his Jeep. In her type-written report, Brosseau described her perception of the threat presented by Haugen's escape. In relevant part, her report states:

> I was fearful for the other officers on foot who I believed were in the immediate area, for the occupied vehicles in his path and for any other citizens who might be in the area. It should be noted

> that the small red car [*i.e.,* Nocera's Honda] was parked directly in front of the Jeep and that I had last seen Nocera and her daughter sitting inside of it. I saw no one between the Jeep and me. I fired one round through the rear driver's side window. I had aimed at a position I perceived would be the driver's location in an attempt to stop him before he could hurt anyone.
>
> . . .
>
> During my encounter with Haugen it was obvious that he was in a wholly unstable frame of mind. He did not exhibit any regard for his own life. I considered Haugen an immediate danger to all around him and made every attempt to stop him including attempting to stun him by striking his head. At this time I am unable to make an accurate estimation of the distance the Jeep was from me when I fired.

In her tape-recorded police department interview, Brosseau further described her decision to use deadly force based on what she perceived as the threat posed by Haugen's imminent escape. The relevant portions of her interview are as follows:

> Q. At that point, who then did you become concerned about?
>
> A. . . . [M]y concern at that point and time were for the vehicles directly in front of him. One, which was um, directly in front of him, which is occupied by a woman and her child. And the other officers that I felt were in the immediate area, that were coming on foot to back me up. I was quite sure that some of them were right close to where he was driving.
>
> . . .

Q. How close do you think his uh, speeding car came from striking [Nocera's red Honda]?

A. 2I don't know.

Q. Okay. Was it within ten feet?

A. I don't know. . . . I'm having some trouble with perceptions of distances.

Q. Okay. Can you estimate how close you were to his car um, when you fired the shot?

A. No. Not at this time.

. . .

Q. Okay. Did, was there a way for him, the Cherokee to get out onto the street by using the driveway?

A. No.

Q. So what did you think he was going to do?

A. Well, the driveway was completely blocked by the uh, the pick up truck. And the little red car was almost completely blocking it as well. So, I thought that his only way out of there was going to be to, to strike the truck or the little red car, or both.

Q. So the two people in the truck were, were in danger of being struck by a recklessly driven vehicle?

A. Yes.

Q. As well as the little girl and the mother?

A. Yes.

Q. Haugen's girlfriend in the red car? Where, were [sic] did [sic] you believe the other officers at

the scene were, um, during the incident where you, were you, when you fired the shot? At that moment.

A. At that moment uh, can we stop the tape again for a second?

. . .

Q. When you were at the driver's door confronting Haugen, um, where were the other officers at the scene?

A. I, I did not see where they were at.

Q. Where did you think they were at?

A. I presume that they were in the immediate area, approaching to assist me.

. . .

Q. Um, what was your objective when you fired your weapon at the moment you fired the weapon?

A. To protect my fellow officers and the community from an eminent [sic] danger.

Q. You reasonably believed that there was an immediate threat to their life?

A. Yes, I do.

. . .

Q. Okay. And once again, just so that I know for sure, can you give me an, your basis for the reasonable belief that the other people's lives were threatened?

A. First of all, I still had in mind that he had a weapon. Um, I thought that it would be very

> difficult for him to try and shoot at me from the position we were at when I fired. Uh, however, I felt that he could've fired on any officers in front of him, or the people in the pick-up truck, uh, who he had cause to be unhappy with. And his driving, more than anything else. His vehicle. I did not believe he could see where he was going. He was driving in an erratic manner. Now had pedestrians and officers and residents in the area.

Brosseau thus indicated in her written statement and interview that she was concerned that Haugen's driving would endanger her "fellow officers," the four people in the Honda and the pickup, and others. She variously characterized these people as "any other citizens who might be in the area," those who were "all around him," "the community," and "residents in the area."

To the extent that Brosseau said she shot Haugen because he "was driving in an erratic manner," her statement is not supported by the evidence regarding the timing of the shooting. Haugen says that Brosseau shot him before the Jeep even moved. According to Haugen, not only was he not driving "in an erratic manner," he was not driving at all. Others stated that, at most, Haugen's Jeep had just begun to move. Nocera said that Brosseau shot Haugen after he started the Jeep, just as he was "getting ready to pull out," and that it "was barely starting to roll." Aaron Riddle said he heard the shot "pretty much at the same time" that the Jeep started moving. Irene Riddle said she heard the shot just as Haugen first revved up the Jeep. Neighbor Florence Ledbetter across the street said she saw and heard the shot just when the Jeep "started to move." Tamburello stated that the Jeep was already

moving, but had gone perhaps six feet. Atwood said that Brosseau shot when the Jeep "just started pulling away," that it "[h]adn't moved very far," and that it had gone "maybe" five or ten feet. Accepting the version of the disputed facts most favorable to Haugen, we do not credit Brosseau's assertion that "he was driving in an erratic manner," for we must assume on summary judgment that the Jeep had not even moved when Brosseau shot him.

Brosseau also stated that she thought Haugen's driving was particularly dangerous because he could not see where he was going. Brosseau said that "the front windshield and at least part of the passenger side windows [of the Jeep] were covered with" the newspaper Haugen had used to protect the glass from the spray paint. Haugen, however, testified that there was no paper on the windshield. Atwood also stated that there was no newspaper on the windshield. Tamburello stated that he saw some paper on one side of the windshield, but that Haugen pulled it off before he got in the Jeep. Because at this stage in the proceedings we must construe the factual evidence in Haugen's favor, we cannot say that there was objective evidence supporting Brosseau's claim that Haugen could not see where he was going as a result of the newspaper covering the windshield.

Brosseau further explained that, at the moment she fired, she did not believe that Haugen's impending escape in the Jeep posed a danger to her, but that it did pose a danger to others in the area. She stated that she was worried, specifically, about Nocera, Nocera's daughter, Tamburello, and Atwood. Nocera and her daughter were inside the red Honda that was parked in the driveway between the Jeep and the street. Tamburello and Atwood

were seated in the pickup that was parked in the street at the end of the driveway.

Brosseau indicated that she was worried that Haugen could not escape without hitting the Honda or the pickup. According to Brosseau, the driveway was "completely blocked" by the pickup and "almost completely block[ed]" by the Honda. But Brosseau could not say how close Haugen actually came to hitting the Honda: "I'm having some difficulty with perceptions of distances." Brosseau nonetheless argues that she reasonably believed that Haugen's escape was dangerous because he was likely to hit the Honda or the pickup.

Contrary to Brosseau's statements, Haugen stated that he had an easy escape by driving off to the left around the Honda and pickup. Haugen admitted that he was in a fairly "small, tight space" which was "not like a parking lot," but he said that the driveway was about twenty feet wide and that he had "plenty of room" to drive between the Honda and the neighbor's house without hitting anything. The Jeep was already angled to the left, and Atwood stated that he saw Haugen turn the wheels to the left before putting the Jeep in gear. Haugen said that he had a "clear, straight shot" out of the driveway. The photographs of the scene also show that Haugen had more than enough room to drive away without striking Nocera's Honda or Tamburello's pickup. Viewing the evidence in Haugen's favor, we conclude that Brosseau has not pointed to objectively reasonable factors to support her belief that Haugen's escape from the driveway posed a significant risk of death or serious injury to the people in the Honda and the pickup.

Brosseau also asserted that she feared for the safety of her fellow officers. She has offered no specific evidence to support this fear. She claims that she "presume[d] that they were in the immediate area, approaching to assist," but she does not claim that she saw them or knew that they were in a dangerous place. She had left officers Subido and Pashon, the only other officers on foot, in Rounds's backyard. Two other officers were in their patrol cars in containment positions on the street several hundred feet to the south of Haugen's mother's house. Brosseau had not called Subido and Pashon to assist her, and there is no indication that they were running to give her aid. Atwood, who witnessed the events while seated in Tamburello's pickup, stated that the other two officers were still in the backyard at the time Brosseau fired. Even if they had been running to assist, Subido and Pashon would have been running from the south-east, while Haugen was escaping to the north-west. Thus, while Brosseau stated that she feared that officers on foot might be struck by Haugen's Jeep as he drove away, her statement is no more than a "a simple statement" of fear unsupported by "objective factors." *Deorle*, 272 F.3d at 1281. She has not offered any evidence to support the claim that Haugen posed a significant risk of death or serious bodily injury to fellow officers.

d. High-Speed Police Chase

The dissent contends that a need to prevent a dangerous high-speed police chase justified Brosseau's decision to use deadly force. Brosseau stated that she was concerned about Haugen's erratic driving, but she never stated that she shot to prevent a dangerous high-speed chase, and has not argued to us that a potential chase justified her use of

deadly force. In this respect, this case to some extent resembles *Garner,* where the police officer had initially justified his use of deadly force based only on the need to prevent Garner's escape but asserted later – apparently through counsel – that deadly force was justified by Garner's dangerousness. *See Garner,* 471 U.S. at 21. We know from *Graham v. Connor,* 490 U.S. 386, 397 (1989), that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." The relevant facts and circumstances are those known to the officer at the time she acts. "[A]n officer's use of force must be objectively reasonable based on [her] contemporaneous knowledge of the facts." *Deorle,* 272 F.3d at 1281. We examine the objective facts and circumstances known to Brosseau at the time she acted to determine whether she had probable cause to believe that a potential high-speed chase "pose[d] a significant threat of death or serious physical injury to the officer or others." *Garner,* 471 U.S. at 3.

At the time Brosseau shot Haugen, it was clear that he intended to flee in his Jeep and that a number of non-lethal measures had failed to prevent him from doing so. But it is equally clear that Brosseau and her fellow officers did not need to kill Haugen in order to avoid a dangerous high-speed chase. They could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely. Haugen had already remained at large for several months while his no-bail warrant was outstanding, and there is no reason that the events of February 20 and 21 suddenly made his freedom an immediate threat to public safety. The cost to society of allowing criminals to flee is great, but the Supreme Court has held that this cost

does not always justify deadly force. "It is not better that all felony suspects die than that they escape." *Id.* at 11.

Because Brosseau has made no argument based on the danger of a potential high-speed chase, there is nothing in the record to tell us whether, under the Puyallup Police Department policies or other applicable rules, it would have been appropriate for the officers to initiate or continue a high-speed chase that posed a significant danger to others. We note, however, that under Washington law, police officers in pursuit must drive with due regard for the safety of others. *See* Wash. Rev. Code § 46.61.035. Officers in Washington may be held liable for injuries caused during high-speed chases, and, to comport with their state law duty of care, they must recognize "that at times it would be more prudent to cease a pursuit in order to protect the public." *Mason v. Bitton,* 534 P.2d 1360, 1363 (Wash. 1975).

Different states and localities have different laws and policies regarding police pursuit. Many have recognized that officers have duties of care in relation to vehicular pursuits, and that officers may be unreasonable in initiating or continuing high-speed chases depending, among other things, on the nature of the suspect's crimes.[1] "Unusual

[1] *See, e.g., Biscoe v. Arlington County,* 738 F.2d 1352, 1363 (D.C. Cir. 1984) (applying D.C. law); *Seals v. City of Columbia,* 641 So. 2d 1247, 1248 (Ala. 1994); *Estate of Aten v. City of Tucson,* 817 P.2d 951, 955 (Ariz. Ct. App. 1991); *City of Caddo Valley v. George,* 9 S.W.3d 481, 487 (Ark. 2000); *Brummett v. County of Sacramento,* 582 P.2d 952, 956 (Cal. 1978); *Tetro v. Town of Stratford,* 458 A.2d 5, 8-10 (Conn. 1983); *City of Pinellas Park v. Brown,* 604 So. 2d 1222, 1225 (Fla. 1992); *Cameron v. Lang,* 549 S.E.2d 341, 347-48 (Ga. 2001); *Boyer v. State,* 594 A.2d 121, 132 (Md. 1991); *Fiser v. City of Ann Arbor,* 339 N.W.2d 413,

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circumstances may make it reasonable" for police to initiate or continue high-speed chases, but "such conduct is not justified unless the end itself is of sufficient social value." *Haynes v. Hamilton County,* 883 S.W.2d 606, 611 (Tenn. 1994). "The decision to initiate or continue pursuit may be negligent when the heightened risk of injury to third parties is unreasonable in relation to the interest in apprehending suspects." *Travis v. City of Mesquite,* 830 S.W.2d 94, 99 (Tex. 1992). A ruling that allowed officers to use deadly force to prevent all vehicular escapes would have the paradoxical result that officers could reasonably shoot to kill even when, under state law, they could not reasonably initiate or continue a chase.

The dissent concludes that a justifiable means of eliminating the danger of a possible high-speed chase in this case is to shoot the suspect before he begins to drive away. The dissent relies on an article, not cited by the parties, attesting to the danger of police chases. *See* dissent at 10622, n.5 (citing John Hill, *High Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction,* FBI

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417 (Mich. 1983) (overruled in part, *Robinson v. City of Detroit,* 613 N.W.2d 307 (Mich. 2000)); *Smith v. City of West Point,* 475 So. 2d 816, 818 (Miss. 1985); *Oberkramer v. City of Ellisville,* 650 S.W.2d 286, 292 (Mo. Ct. App. 1983); *Lee v. City of Omaha,* 307 N.W.2d 800, 803 (Neb. 1981); *Selkowitz v. County of Nassau,* 379 N.E.2d 1140, 1143 (N.Y. 1978); *Parish v. Hill,* 513 S.E.2d 547, 550 (N.C. 1999); *Jones v. Ahlberg,* 489 N.W.2d 576, 580 (N.D. 1992); *Lowrimore v. Dimmitt,* 797 P.2d 1027, 1030-31 (Or. 1990); *Kuzmics v. Santiago,* 389 A.2d 587, 590 (Pa. Super. Ct. 1978); *Haynes v. Hamilton County,* 883 S.W.2d 606, 610-11 (Tenn. 1994); *Travis v. City of Mesquite,* 830 S.W.2d 94, 99 (Tex. 1992); New Jersey Police Vehicular Pursuit Policy, Att'y Gen. Guidelines (Dec. 2001); Los Angeles Police Dep't Manual, ch. 555 (2003); Seattle Police Dep't Policies & Procedures § 1.141 (2003).

Law Enforcement Bulletin 14 (July 2002)). But the article reaches quite a different conclusion from the dissent. Even after a suspect has fled and a pursuit has been initiated,

> [t]he most effective way to reduce risks is to terminate a pursuit. Clearly, too many pursuits continue that officers obviously should have terminated. Research on pursuit data and statistics show that termination dramatically could reduce traffic accidents, fatalities, and injuries. Police must reevaluate their thinking and mission. Agencies rarely can justify endangering the public to pursue a violator.

Hill, *supra,* at 16 (endnote omitted). Thus, just as *Garner* instructs that, to comply with the Fourth Amendment, an officer must sometimes forgo or discontinue deadly force and allow a suspect to escape, *see* 471 U.S. at 11-12, state tort laws and police practice experts instruct that an officer must sometimes forgo a chase and allow a suspect to escape.

It is no less true in potential high-speed chases than in other circumstances that an officer may appropriately use deadly force if "necessary to prevent an escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3. But because officers can often eliminate or reduce the danger of a high-speed chase by forgoing or discontinuing a chase, we reject an approach that would allow officers to shoot a suspect simply because he is fleeing, or is about to flee, in a vehicle. Such an approach would essentially limit the Supreme Court's holding in *Garner* to cases where a suspect flees on foot. The Court's opinion contains no such limitation, and we decline to read such a limitation into it.

To support its contention that the possibility of a dangerous high-speed chase justified Brosseau's use of deadly force in this case, the dissent cites general statistics of the dangers of car chases. These statistics have not been supplied by the parties, and perforce have not been relied on by Brosseau or responded to by Haugen. Moreover, even if we could properly take judicial notice of statistics of car chases, the Supreme Court already has rejected this kind of general statistical approach to prove dangerousness in an individual case. In *Garner,* Tennessee attempted to justify its use of deadly force on a fleeing burglar by noting that 3.8% of burglaries involved violent crime, accounting for literally millions of incidents of violence. *See id.* at 21-22 & n.23. But the Supreme Court held that the general statistical probability alone cannot justify deadly force. A generalized assessment of dangerousness of burglars "could not, without regard to the other circumstances, automatically justify the use of deadly force." *Id.* at 21.

In some fairly extreme circumstances, our sister circuits have held that the danger presented by suspects who flee in vehicles can justify deadly force. In *Smith v. Freland,* 954 F.2d 343, 347-48 (6th Cir. 1992), the Sixth Circuit held that an officer was justified in using deadly force after a suspect had led police on a high-speed chase at speeds over ninety miles per hour, swerved toward police cars several times, and smashed into an officer's car while the officer stood next to it. In *Cole v. Bone,* 993 F.2d 1328, 1330-33 (8th Cir. 1993), the Eighth Circuit held that deadly force was justified where the suspects, driving an eighteen-wheel tractor-trailer, had led police on an extended chase at speeds over ninety miles per hour through heavy traffic, forcing over 100 cars off the road, and had

swerved at pursuing police several times. In that case, before using deadly force, the police had attempted roadblocks and had tried to disable the truck by shooting the tires and radiator. In *Scott v. Clay County,* 205 F.3d 867, 877-78 (6th Cir. 2000), the Sixth Circuit held that deadly force was justified where the suspect had swerved off the road, narrowly missed an unmarked cruiser and a sheriff on foot, led police on a twenty-minute chase at speeds up to 100 miles per hour, and after losing control, attempted to run down an officer. In *Pace v. Capobianco,* 283 F.3d 1275, 1281-82 (11th Cir. 2002), the Eleventh Circuit held that deadly force was justified where a suspect, already pepper-sprayed after struggling with an officer, led police on an extended high-speed chase, during which he made erratic turns, drove on the wrong side of the road with his headlights off, swerved at oncoming cars, drove through a yard, nearly hit a motorist, and then accelerated toward a patrol car.

But our sister circuits have also held that police chases – even high-speed chases – do not always justify deadly force. *See Vaughan v. Cox,* 264 F.3d 1027, 1031-34 (11th Cir. 2001), *vacated by* 536 U.S. 953, (2002), *reinstated and supplemented on remand at* 316 F.3d 1210 (11th Cir. 2003)); *Donovan v. City of Milwaukee,* 17 F.3d 944, 946-51 (7th Cir. 1994). In *Vaughan,* officers pursued a vehicle that had rammed a patrol car and then accelerated to eighty or eighty-five miles per hour in an attempt to avoid capture. In an attempt "to disable either the truck or [the driver]" one of the officers fired three rounds into the truck. One of the bullets struck the passenger in the truck, puncturing his spine. The Eleventh Circuit held, in those circumstances, that "a reasonable jury could find that [the suspects'] escape did not present an immediate threat of

serious harm to [officers] or others on the road." 264 F.3d at 1034. *See also id.* at 1034 n.8 (distinguishing that case from *Smith, Cole,* and *Scott*). In *Donovan,* the Seventh Circuit held that officers engaged in a high-speed pursuit were not justified in using deadly force – in this case, a road block – to stop a fleeing motorcycle. The court stated that it was "very skeptical" of an approach that would allow police to use deadly force to end vehicular pursuits in all circumstances, because "not every fleeing suspect poses a grave danger." 17 F.3d at 951. In both *Vaughan* and *Donovan,* unlike in this case, the suspects already were driving in a dangerous manner without regard for the safety of others. But in those cases, that danger was held to be insufficient to justify deadly force.

None of the cases decided by our sister circuits and cited by the dissent even remotely supports a holding in this case that Brosseau was justified in using deadly force. Unlike the dissent, we believe that there is a manifest difference between swerving at cars while driving at ninety miles per hour and then smashing a patrol car with an officer standing next to it, *see Smith,* 954 F.2d at 347-48; driving an eighteen-wheel truck at ninety miles per hour through heavy traffic, *see Cole,* 993 F.2d at 1330-31; leading a twenty-minute chase at 100 miles per hour and attempting to run down an officer, *see Scott,* 205 F.3d at 877-78; and driving at high speeds on the wrong side of the road with headlights off and accelerating toward a patrol car, *see Pace,* 283 F.3d at 1281-82, on one hand; and getting into a vehicle and fleeing, or preparing to flee, on the other.

To the extent that the dissent looks to the particular facts of this case rather than to the general danger of police chases, it does not view the evidence in the light

most favorable to Haugen, as we are required to do on summary judgment. For example, to portray Haugen as violent and therefore dangerous, the dissent asserts that he was engaged in a "violent brawl" when Brosseau arrived on the scene. Dissent at 10620. By all accounts, however, Haugen was on the receiving end of the violence. Tamburello stated, "[W]hen he seen me he started to run. . . . And I ran over and grabbed him. Got into a little scuffle there. . . . I was on top of him on the ground." Atwood, Tamburello's companion, stated that when Tamburello caught Haugen, he "squirmed a little bit. Tried to get away. You know, he begged him, didn't want to go [.]" Nocera, Haugen's girlfriend, stated that Tamburello "ran up and tackled Ken to the ground," and "continued to pounce on him out here by the [car]." Moreover, the "brawl" (if that is what it was) was finished before Brosseau arrived.

Further, to exaggerate the danger of Haugen's escape, the dissent stresses that Haugen had to escape through a "narrow passageway" and a dangerous "obstacle course." Dissent at 10624. Haugen said that he was in a "small, tight space" that was "not like a parking lot," but that the driveway was twenty feet wide, giving him "plenty of room" and a "clear, straight shot" to get to the street. The photographs of the scene show that Haugen had more than enough room to escape without hitting anything or anyone. Indeed, he was able to drive away safely even after Brosseau shot him.

Finally, the dissent characterizes Haugen as "deranged" and "wild," dissent at 10623, 10629, but this characterization is not supported by the record. Brosseau stated that she held her handgun to Haugen's temple, that he yelled "you're gonna have to fuckin kill me." But her version of the facts is contradicted by Haugen's version of

the facts and by the other witnesses, who saw and heard no such thing. The dissent also asserts that Haugen was behaving "suicidally," dissent at 10620, but there is no indication in the record that Haugen intended to harm himself. (Of course, on the dissent's view, fleeing from police in a vehicle was itself suicidal since the police could shoot to kill.)

e. Fourth Amendment Conclusion

Based on the foregoing, we conclude that there is insufficient objective evidence in the record to grant Brosseau's summary judgment motion. Taken in the light most favorable to Haugen, the objective evidence, examined in light of the totality of circumstances surrounding this case and evaluated as of the time Brosseau actually fired her gun, does not support a conclusion as a matter of law that Brosseau had "probable cause to believe that [Haugen] pose[d] a significant threat of death or serious physical injury to the officer or others." *Garner,* 471 U.S. at 3. We therefore conclude a reasonable jury could conclude, based on this evidence, that Brosseau's conduct violated Haugen's Fourth Amendment right. *See Katz,* 533 U.S. at 201.

2. Qualified Immunity

Having determined that "a violation could be made out on a favorable view of [Haugen's] submissions," *id.,* we must next decide whether Brosseau is nonetheless entitled to qualified immunity. She is not entitled to immunity if the Fourth Amendment right at issue was clearly established. *See id.* For a right to be clearly established, it must

be defined with sufficient specificity that a reasonable officer would have known she was violating it.

In some situations, the Fourth Amendment's general prohibition against excessive force may not be sufficiently specific to put an officer on notice of what conduct is allowed and what is not:

> [T]here is no doubt that *Graham v. Connor* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Id. at 201-02 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). In other words, if Brosseau made a reasonable mistake about what the law requires, she is immune from suit. *See id.* at 205.

On the other hand, state officials are not entitled to qualified immunity simply because no case with materially similar facts has held their conduct unconstitutional. *See Hope v. Pelzer,* 536 U.S. 730, 739-41 (2002); *Flores v. Morgan Hill Unified Sch. Dist.,* 324 F.3d 1130, 1136-37 (9th Cir. 2003). The standard is one of fair warning: where the contours of the right have been defined with sufficient specificity that a state official had fair warning that her conduct deprived a victim of his rights, she is not entitled to qualified immunity. *See Pelzer,* 536 U.S. at 740 & n.10.

Beyond the general proposition that excessive force is unconstitutional, the Supreme Court in *Garner* articulated a "special rule" governing the use of deadly force. *See Monroe v. City of Phoenix*, 248 F.3d 851, 860 (9th Cir. 2001). Under *Garner*, deadly force is only permissible where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." 471 U.S. at 11. *See, e.g., Harris*, 126 F.3d at 1202 (holding that the FBI agent in the Ruby Ridge civil case was not entitled to qualified immunity); *Curnow*, 952 F.2d at 324-25 (holding that officers were not entitled to qualified immunity where they shot a suspect who possessed a gun but was not pointing it at the officers and was not facing the officers when they shot).

The doctrine of qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force." *Katz*, 533 U.S. at 206. Officers are not liable when they err in borderline cases. *See Deorle*, 272 F.3d at 1285. But the evidence here, when taken in the light most favorable to Haugen, does not present a borderline case. Viewing the evidence in Haugen's favor, Brosseau shot Haugen in the back even though he had not committed any crime indicating that he posed a significant threat of serious physical harm; even though Brosseau had no objectively reasonable evidence that Haugen had a gun or other weapon; even though Haugen had not started to drive his vehicle; and even though Haugen had a clear path of escape. Viewing the evidence in Haugen's favor, there is insufficient objective evidence to support Brosseau's stated concern that, at the time she shot him, Haugen posed a significant risk to police officers or others in the area. We therefore conclude that Brosseau's mistake about the requirements of the

Fourth Amendment was unreasonable, and that she had "'fair warning' that [her] conduct deprived [Haugen] of a constitutional right." *Pelzer*, 536 U.S. at 740.

We are mindful that police officers are called upon "to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. We must judge Officer Brosseau's action at the time she decided to shoot, and we must give her leeway to make reasonable mistakes.

But we are also mindful of the grave threat to constitutional rights that is present when government officials use deadly force against citizens. "[W]hile giving due deference to difficult judgment calls made on the street, we also must insure the rights of citizens, even fleeing felons, to be free from unreasonable seizures." *Donovan*, 17 F.3d at 951. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner*, 471 U.S. at 9. "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion." *Id.* at 10. It was for that reason that the Supreme Court in *Garner* held that deadly force may not be used simply because a felony suspect is successfully evading arrest. Viewing the evidence in Haugen's favor, Brosseau's use of deadly force was a clear violation of *Garner*, and consequently she is not entitled to summary judgment based on qualified immunity.

B. Fourth Amendment Claims Against the City and Police Department

In addition to suing Officer Brosseau, Haugen also sued the City of Puyallup and the Puyallup Police Department. Municipalities are "persons" subject to suit under 42 U.S.C. § 1983. *See Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 691 n.55 (1978). Municipalities cannot be held liable under a traditional *respondeat superior* theory. Rather, they may be held liable only when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

Haugen's complaint did not allege, and he has not argued to us on appeal, that Brosseau was acting pursuant to any pre-existing policy when she shot him. Rather, he contends that the city and the police department are at fault because they failed to discipline Brosseau after the shooting. Haugen cannot, of course, argue that the municipality's later action (or inaction) caused the earlier shooting. Haugen argues instead that the city and police department should be held liable because they "ratified" Brosseau's decision to use deadly force.

The ratification doctrine, asserted as a basis for municipal liability, originated in *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). There, a plurality of the Supreme Court stated that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127. But the sentence from *Praprotnik* must be read in context. The Court held in *Praprotnik* that to establish municipal liability, a plaintiff must "prove[ ] the existence of an unconstitutional municipal policy." *Id.* at 128. A single decision by a municipal policymaker "may be sufficient to trigger section

1983 liability under *Monell*, even though the decision is not intended to govern future situations," *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)), but the plaintiff must show that the triggering decision was the product of a "conscious, affirmative choice" to ratify the conduct in question. *Gillette*, 979 F.2d at 1347. In the present case, Haugen has made no such showing.

Although some municipal pronouncements ratifying a subordinate's action could be tantamount to the announcement or confirmation of a policy for purposes of *Monell*, here there are no facts in the record that suggest that the single failure to discipline Haugen rises to the level of such a ratification. *See, e.g., Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) (refusing to hold that the "failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under *Monell*". The City of Puyallup and the Puyallup Police Department are therefore entitled to summary judgment.

C. State Law Claims Against Brosseau

Haugen also sued Brosseau based on state law tort claims. Under Washington law,

> [i]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.

Wash. Rev. Code § 4.24.420 (2003). The district court dismissed Haugen's state law claims because, in its view,

Haugen was engaged in the commission of a felony when Brosseau shot him. Washington law provides that

> [a]ny driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

Id. § 46.61.024.

After being shot, Haugen drove away and, for a time, refused to stop for police. He ultimately pled guilty to a felony under § 46.61.024. But, as discussed in section A.1.c., *supra,* there is a disputed factual question about when Brosseau shot Haugen. Construing the facts in Haugen's favor, it appears that Brosseau may have shot Haugen before he had begun to "drive his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others." *Id.* It therefore is not clear that he "was engaged in the commission of a felony *at the time of the occurrence* causing the injury" or that his felony "was a proximate cause of" his injury. *Id.* § 4.24.420 (emphasis added). At this stage in the proceedings, it is not clear that Brosseau will have the benefit of the complete defense provided in § 4.24.420. We therefore reverse the district court's grant of summary judgment on Haugen's state law tort claims.

Conclusion

For the foregoing reasons, we REVERSE the district court's grant of summary judgment on Haugen's § 1983 claim against Brosseau. We AFFIRM the district court's grant of summary judgment on Haugen's § 1983 claims against the City of Puyallup and the Puyallup Police Department. We REVERSE the district court's grant of summary judgment on Haugen's state law claims against Brosseau. We REMAND for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED. Costs to Haugen on his appeal relevant to Brosseau. Costs to the City of Puyallup and the Puyallup Police Department.

REINHARDT, Circuit Judge, concurring:

I join fully in Judge Fletcher's opinion for the court, on the understanding that officers may not use deadly force against an otherwise nondangerous felony suspect simply because a chase of that suspect, high-speed or otherwise, would become or does become dangerous. Rather, as I understand the controlling law, if a high-speed chase of a nondangerous felony suspect would be, or becomes, dangerous, the officers must terminate the chase. In other words, the chase itself cannot create the danger that justifies shooting a suspect who, under *Garner,* may not otherwise be shot. I do not understand the out-of-circuit cases discussed in Judge Fletcher's excellent opinion and in the dissent to hold otherwise.

GOULD, Circuit Judge, dissenting:

I cannot accept the majority's conclusion that Haugen, a visibly disturbed felon willing to do almost anything to avoid capture, did not pose "a significant threat of death or serious physical injury" to others when he attempted a high-speed vehicular flight from police through a suburban residential neighborhood on a Sunday afternoon. Nor can I accept the majority's holding that – because police can reduce the danger of a high-speed chase by letting a felon escape – police may never use deadly force to protect the public from the danger posed by a felon's reckless flight from police in a vehicle. The majority's sweeping holding, which promises an easy escape to any felon willing to threaten innocent lives by driving recklessly, is indefensible as a matter of law and policy, and it conflicts with our sister circuits' holdings that police officers do not violate the Fourth Amendment by using deadly force to stop a fleeing felon who appears likely to drive an automobile with willful disregard for the lives of others.[1] The majority opinion creates a new obstacle to effective law enforcement in the western United States. It threatens the innocent to protect the guilty.

I

Under *Tennessee v. Garner,* 471 U.S. 1 (1985), the reasonableness of Officer Brosseau's conduct under the Fourth Amendment depends on (1) whether she had probable cause to believe that Haugen's fleeing the scene

[1] As I explain below, the majority creates a circuit split, departing from the holdings of the Sixth, Eighth, and Eleventh Circuits.

in his car would pose "a significant threat of death or serious physical injury" to others and (2) whether deadly force was necessary to prevent Haugen's escape. *Id.* at 3. Officer Brosseau's conduct was reasonable under the *Garner* standard.

Viewing the evidence in the light most favorable to Haugen, as we must at this stage,[2] Officer Brosseau had probable cause to believe that Haugen's fleeing the scene in his car would pose a significant threat of serious harm to others. Haugen was a desperate man capable of desperate measures. Haugen was a felony suspect who, when Officer Brosseau arrived on the scene, was engaged in a violent brawl with two other men.[3] Haugen defied

[2] This is because the district court granted summary judgment to Officer Brosseau.

[3] In an attempt to portray Haugen as appearing peaceful, the majority states that, "[b]y *all accounts,* . . . Haugen was on the receiving end of the violence . . . [and] the 'brawl' . . . was finished when Brosseau arrived." *See supra* at 10611 (emphasis added). The majority omits *Haugen's account* in his deposition, in which he admitted to engaging in acts of violence. Haugen stated that he and his adversary "got into a wrestling thing." Haugen then stated that, just after Officer Brosseau arrived on the scene, he "elbowed Atwood and went for the keys in his truck." Haugen continued, "[T]he police pulled up. [Atwood and Tamburello] were distracted. I ellbowed [sic] [Atwood] the rest of the way out of the car and got away from him."

In any event, it does not matter whether Haugen or his adversaries were the initial aggressors in their combat. What matters is Officer Brosseau's "contemporaneous knowledge of the facts," *see Deorle v. Rutherford,* 272 F.3d 1272, 1281 (9th Cir. 2001), and Officer Brosseau knew only that Haugen was engaged in a violent brawl when she arrived on the scene. It is undisputed that Officer Brosseau received a radio dispatch stating that there was a "fight in progress" and that "[t]wo men were fighting on the ground." Officer Brosseau was entitled to consider the fact that Haugen had been fighting as one factor in

(Continued on following page)

Brosseau's orders to stop; he ignored her brandishing a gun at close range; he ignored her beating his car window with the butt of her gun; he ignored her shattering his car window; he ignored her striking him in the head with the butt of her gun; he ignored her attempts to grab his keys. Haugen was behaving wildly, even suicidally (defying an officer brandishing a gun at close range), and Officer Brosseau had probable cause to believe that Haugen would do almost anything to avoid capture. *See Menuel v. City of Atlanta,* 25 F.3d 990, 995 (11th Cir. 1994) (from the vantage of an officer confronting a dangerous suspect, "a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death").[4]

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assessing Haugen's potential dangerousness, and the majority errs by dismissing it.

[4] The majority states that Officer Brosseau was not motivated by a desire to protect the community from Haugen's likely erratic driving. This is false. In Officer Brosseau's tape-recorded police department interview, Brosseau stated that she shot Haugen "to protect my fellow officers *and the community* from an eminent [sic] danger." (emphasis added). She then stated that she was concerned for "pedestrians and officers *and residents in the area.*" (emphasis added). In her written statement, Officer Brosseau stated,

> During my encounter with Haugen it was obvious that he was in a wholly unstable frame of mind. He did not exhibit any regard for his own life. I considered Haugen an immediate danger *to all around him* and made every attempt to stop him.

(emphasis added). Officer Brosseau's expressed concerns were to protect the community, the residents in the area, and all those around Haugen. She did not, as the majority implies, limit her concern to people in the immediate area.

As Haugen admitted in his deposition, he attempted a high-speed vehicular flight through suburban streets. Haugen admitted that he drove as fast as he could when he left the driveway, that he drove through the residential streets as fast as his car would go in third gear, and that he would have driven faster if the bullet wound had not made it difficult for him to shift gears. Haugen later pled guilty to the felony of "eluding," admitting he drove his vehicle "in a manner indicating a wanton or willful disregard for the lives or property of others." Wash. Rev. Code § 46.61.024. That Haugen, by his own admission, drove his car in a manner indicating "a wanton or willful disregard for the lives . . . of others" is powerful evidence of the reasonableness of Officer Brosseau's earlier belief that he would pose a significant threat of serious harm to others if permitted to escape.

A criminal suspect's fleeing from police in an automobile is inherently dangerous. The National Highway Traffic Safety Administration reports that 314 people were killed during police pursuits in 1998, the last year for which I can find a record.[5] National Highway Traffic Safety Administration, Fatality Analysis Reporting System – ARF, *Fatalities in Crashes Involving Law Enforcement in Pursuit 1998* (2000). Of that total, two were police

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[5] Though these statistics demonstrate that felons fleeing from police in automobiles put the public at serious risk of death or injury, the statistics almost certainly understate the extent of the danger, due to the lack of a mandatory reporting system. John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction,* Law Enforcement Bulletin 14 (July 2002) ("Even conservative estimates by various researchers recalculate the actual number of fatalities between 400 to 500 deaths per year.").

officers, 198 were fleeing criminal suspects, and 114 were innocent bystanders. *Id.* Presumably, many more high-speed pursuits result in serious injuries.[6]

The annals of law are filled with stories of police chases with tragic ends. In *City of El Centro v. United States,* a driver fleeing from police flipped his van, leading to an explosion that killed him and two passengers and that injured another fourteen passengers. 922 F.2d 816, 818 (Fed.Cir. 1990). In *Mays v. City of E. St. Louis, Ill.,* a driver fleeing from police ran into a cement barrier, killing one passenger and severely injuring eight others. 123 F.3d 999, 1000 (7th Cir. 1997). In *Roach v. City of Fredericktown,* a driver fleeing from police lost control of his car and collided with an oncoming car, killing himself and seriously injuring others. 882 F.2d 294, 295 (8th Cir. 1989). In *Helseth v. Burch,* a driver fleeing from police ran a red light and collided with a pickup truck, killing the truck's

[6] The majority faults me for citing these official government statistics, arguing that the Supreme Court in *Garner* rejected "this kind of general statistical approach." *Supra* at 10608. The majority misrepresents my analysis. I do not, as the majority says, rely solely on statistics to support my view that Officer Brosseau was entitled to use deadly force. Rather, I rely on the objective circumstances – most notably Haugen's wild behavior immediately before he sped away in his jeep – that demonstrated to observers that Haugen was about to drive with willful disregard for the lives of others. My analysis does not depend on the government statistics, which I cite merely to emphasize the reasonableness of Officer Brosseau's decision to use deadly force and the important consequences to our society if Officer Brosseau's appropriate conduct is condemned.

Moreover, my use of statistics is consistent with the Supreme Court's use of statistics in *Garner. See* 471 U.S. at 21 (relying on a Bureau of Justice Statistics report to support the conclusion that "burglaries only rarely involve physical violence.").

passenger, rendering the truck's driver a quadripelegic, and seriously injuring three children in his own car. 258 F.3d 867, 869 (8th Cir. 2001) (en banc). In *Mason v. Bitton,* a driver fleeing from police lost control of his car, crossed a median, and collided with an oncoming car, killing the occupants of both cars. 534 P.2d 1360, 1361-62 (Wash. 1975). These judicial decisions tell the tragic stories of only a few deadly police chases. There have been thousands more in the past. And there will be thousands more in the future, particularly if the majority's view prevails, deterring law enforcement from protecting the public.

I do not suggest that police marksmen may fire at will upon any felon fleeing in an automobile, merely because the felon is leaving the scene of a crime or because the felon has violated traffic laws.[7] Rather, I suggest that where police have probable cause to believe a fleeing felon will drive with willful disregard for the lives of others, the Supreme Court's *Garner* decision permits officers to use

[7] The majority thus mischaracterizes my analysis as "an approach that would allow officers to shoot a suspect simply because he is fleeing, or is about to flee, in a vehicle." *Supra* at 10608. Contrary to the majority's mischaracterization, I would hold that deadly force is reasonable only when it appears that a fleeing felon will drive with willful disregard for the lives of others. Here, Haugen's wild and defiant actions (which included disobeying a police officer brandishing a gun at close range) prior to fleeing in his vehicle plainly indicated that he would take any steps necessary to avoid capture, including driving with willful disregard for the lives of others, which Haugen – by his own admission – subsequently did. As Officer Brosseau stated,

> During my encounter with Haugen it was obvious that he was in a wholly unstable frame of mind. He did not exhibit any regard for his own life. I considered Haugen an immediate danger to all around him and made every attempt to stop him.

deadly force when necessary to protect the public. Officer Brosseau plainly had such probable cause here.

Officer Brosseau was concerned not only with the real possibility that Haugen might cause serious injury or even a fatality if she permitted him to speed through the neighborhood in his car. Brosseau also was concerned with the imminent possibility that Haugen might injure someone on the scene. Photographs in the record show that Haugen "peeled out" (he accelerated, leaving visible skid marks) of a driveway blocked on three sides by houses and a garage. Directly in Haugen's path were parked vehicles containing four persons, including a young child. Only by driving through this narrow passageway,[8] around the corner of a neighbor's house, and across a neighbor's lawn (a maneuver Haugen admitted he executed while accelerating "as quickly as [he] could") did Haugen avoid the cars. Brosseau was right to worry that Haugen, if permitted to speed through this obstacle course, would seriously injure the innocent bystanders or one of the police officers Brosseau believed were running toward the scene on foot to assist her.

The first prong of the Supreme Court's *Garner* test is met. Not only was Haugen fleeing in a 3,000 pound vehicle, but also he was behaving in a manner that suggested he would drive with reckless disregard for the lives of others (as he subsequently did). Presented with a desperate man taking desperate measures in a deadly machine, Officer Brosseau reasonably concluded that Haugen posed

[8] Haugen in his deposition described this passageway as a "small, tight space."

a significant threat of serious harm to the community. *See United States v. Aceves-Rosales,* 832 F.2d 1155, 1157 (9th Cir. 1987) ("It is indisputed that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon.") (per curiam).

The second prong of the *Garner* test also is met, because deadly force was necessary to prevent Haugen from escaping. Deadly force is not necessary where there exists a less drastic alternative that is "reasonably likely to lead to apprehension before the suspect can cause further harm." *Forrett v. Richardson,* 112 F.3d 416, 420 (9th Cir. 1997). Here, Officer Brosseau attempted several less drastic alternative means of subduing Haugen before shooting him. She called several other officers and a police dog to scour the neighborhood for him. She ordered him to freeze as he ran to his car. She chased him. She ordered him to open the door and to get out of his car. She brandished her gun – effectively warning him that he must relent or be shot. She smashed his driver's side window. She beat his head with the butt of her gun. She tried to take his keys. Only after Officer Brosseau had attempted several less drastic alternatives – alternatives that failed to subdue Haugen – did she resort to the extreme step of shooting Haugen.

Haugen urges that a less drastic alternative would have been for Officer Brosseau to permit him to flee in his car. Haugen urges that officers would have been able to capture him another time. However, Haugen fails to recognize the costs to society of allowing felons to flee without constraint. And Haugen fails to explain by what method those officers would have subdued him "*before [he could] cause further harm,*" as our *Forrett* decision (and common sense) requires. 112 F.3d at 420 (emphasis

added). Haugen's reckless departure threatened the safety of people on the scene. His racing through the streets threatened the safety of people in the neighborhood. Research indicates that vehicular flights from police become dangerous very quickly. Fifty percent of all collisions occur in the first two minutes of police pursuit, and more than 70 percent of all collisions occur before the sixth minute of the pursuit. G.P. Alpert, U.S. Department of Justice, National Institute of Justice, *Pursuit Management Task Force Report* (1998). Officer Brosseau correctly decided that waiting was not an option under the circumstances.[9]

Even if permitting Haugen to race away in his automobile *were* a reasonable alternative, we cannot properly

[9] The author of the majority opinion at oral argument asked defense counsel whether Officer Brosseau should have shot Haugen's tires to disable his vehicle. Though the majority opinion does not now rely on this as a possible alternative to the use of deadly force, it is perhaps helpful to explain why shooting Haugen's tires likely would not have been an appropriate or effective tactic to end the threat Haugen posed. Shooting Haugen's tires may not have disabled his car. Haugen still could have escaped – and endangered others – by driving with a flattened tire or two. More importantly, Officer Brosseau would have endangered herself and others had she shot at Haugen's tires. Police ammunition is designed to disable human beings, not to disable automobiles. Had Officer Brosseau fired at Haugen's tires at close range, her bullets might have ricocheted, killing or injuring her or an innocent bystander. Even if Officer Brosseau's bullets penetrated a tire, the bullets would not necessarily have come harmlessly to rest. The bullets could have continued their trajectory, ricocheting off the ground or automobile, killing or injuring the innocent. *See* Rick Parent, *When Police Shoot,* Police Magazine, Oct. 2000 ("Unlike the scenes depicted by 'Hollywood,' the 'shooting out of a tire' can be a precarious and dangerous event."). Officer Brosseau was wise not to shoot Haugen's tires. This "alternative" was no alternative at all.

fault Officer Brosseau for not thinking of it in the heat of the moment. Judges must allow "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 397 (1989). We must judge Officer Brosseau's conduct from the perspective of a reasonable officer on the scene, not from the perspective of a judge in his or her chambers. *Id.* The majority effectively ignores this command from the Supreme Court, measuring Officer Brosseau's conduct not against the standard of a reasonable officer on the scene, but against the standard of its own inexpert judgment as to what Officer Brosseau should have done under the circumstances.

In sum, I would hold that Officer Brosseau had probable cause to believe that Haugen's leading police on a reckless high-speed car chase through a residential neighborhood would pose a significant threat of serious harm to the community and that the use of deadly force was necessary to prevent his escape. I would hold that Officer Brosseau's shooting of Haugen did not violate Haugen's Fourth Amendment rights.

The majority's contrary holding is objectionable not only because it flouts the Supreme Court's *Garner* standard, but also because it creates a circuit split. The Sixth, Eighth, and Eleventh Circuits all have held, as I would hold, that officers are justified in using deadly force when a fleeing felon appears likely to drive with willful disregard for the lives of others. *See Scott v. Clay County,* 205 F.3d 867, 877 (6th Cir. 2000) (holding that police reasonably shot a felon fleeing in an automobile when his reckless driving posed an immediate threat to the safety of officers

and innocent civilians); *Smith v. Freland,* 954 F.2d 343, 347-48 (6th Cir. 1992) (holding that police reasonably shot a misdemeanant fleeing in an automobile when he posed a threat to officers at a police roadblock and appeared likely to "do almost anything to avoid capture"); *Cole v. Bone,* 993 F.2d 1328, 1330-33 (8th Cir. 1993) (holding that police reasonably shot a criminal fleeing in a truck when he posed a threat to travelers driving on a crowded interstate highway); *Pace v. Capobianco,* 283 F.3d 1275, 1281 (11th Cir. 2002) (holding that police reasonably shot a felon fleeing in an automobile when he appeared likely to continue using his vehicle aggressively during a police pursuit).

Contrary to the holdings of every circuit to consider the issue, the majority holds that an officer violates a fleeing felon's Fourth Amendment rights by using deadly force to prevent a dangerous vehicular flight because "officers can often eliminate or reduce the danger of a high-speed chase by forgoing or discontinuing a chase." *Supra* at 10608.[10] The majority believes that police officers

[10] More candid than the majority opinion, Judge Reinhardt's separate concurring opinion restates the majority's holding in explicit terms. The concurring opinion states, "I join fully in Judge Fletcher's opinion for the court, on the understanding that officers may not use deadly force against an otherwise nondangerous felony suspect simply because a chase of that suspect, high-speed or otherwise, would become or does become dangerous. Rather, as I understand the controlling law, if a high-speed chase of a nondangerous felony suspect would be, or becomes, dangerous, the officers must terminate the chase. In other words, the chase itself cannot create the danger that justifies shooting a suspect. . . . " *Supra* at 10618. The majority opinion never disavows Judge Reinhardt's separately stated view, which, in any event, animates the majority opinion's analysis.

should permit felons to speed away unpursued rather than attempt to stop them. *See id.* at 10605 ("[Officers] could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely."); *id.* at 10607 ("[A]n officer must sometimes forego or discontinue deadly force and allow a suspect to escape."). The majority slights the important law enforcement interests in pursuing fleeing felons. *See, e.g., Donovan v. City of Milwaukee,* 17 F.3d 944, 951 (7th Cir. 1994) ("Police officers may, *and ought to*, pursue fleeing suspects, and where those suspects present 'a threat of serious physical harm, either to the officer[s] or others, it is not constitutionally unreasonable to prevent escape by using deadly force.") (emphasis added). The majority neglects the fact that if police are forbidden to pursue, then many more suspects will flee – and successful flights not only will reduce the number of crimes solved but also will create serious risks for passengers and bystanders. *See Mays v. City of E. St. Louis,* 123 F.3d 999, 1003 (7th Cir. 1997). Moreover, the majority errs by putting the onus on *police* to end the pursuit by letting the felon escape, rather than on the fleeing *felon,* who at all times has the power to avoid injury to himself and others by halting as the law requires. *See id.* at 1004 (holding that a police officer's pursuit of a fleeing felon in an automobile played a "causal role" in an ensuing wreck, "but not the *kind* of cause the law recognizes as culpable. . . . [A] criminal's effort to shift the blame [to police] . . . is not one that any legal system can accept.").

The majority attempts to justify its departure from precedent by reasoning that Officer Brosseau's fellow police officers *might have decided* to let Haugen escape in his jeep unpursued and that, for this reason alone, Officer Brosseau did not have probable cause to believe that

Haugen's vehicular flight would pose a danger to others. There are several problems with the majority's reasoning.

First, the majority implies, contrary to the record evidence, that Haugen would have driven safely and carefully away from the scene if he had not been followed by police squad cars. But it is unrealistic to conclude that Haugen, a deranged and defiant felon, would suddenly have been transformed into a model citizen and careful driver the moment he drove away from the scene and did not hear police sirens in pursuit. And even if Officer Brosseau had believed that her fellow officers would not pursue Haugen's vehicle, Brosseau still would have had probable cause to believe that Haugen would speed away from the scene with willful and wanton disregard for others' safety. Indeed, even *before* the police squad cars gave chase, Haugen was, by his own admission, "standing on the gas" in the driveway, accelerating "as quickly as [he] could," within a "small, tight space," a fact that confirms the reasonableness of Officer Brosseau's earlier concern about others' safety.

Second, the majority implies (with no basis in the record) that Washington law or Puyallup Police Department policy prohibited (or, at least, discouraged) Officer Brosseau's fellow officers from pursuing Haugen in their squad cars. Although police officers in Washington may have to compensate a person who is injured by police officers' negligent conduct while pursuing a fleeing felon, *Mason v. Bitton*, 534 P.2d 1360, 1363 (Wash. 1975), Washington law does not prohibit police from pursuing a fleeing felon in a vehicle. So the majority errs by effectively holding that Officer Brosseau was required to assume that her fellow officers would not chase Haugen in their squad

cars and that Haugen would drive away carefully, safely, and unpursued.

Third, Officer Brosseau's fellow officers *in fact* chased Haugen in their squad cars, so Officer Brosseau was correct in assuming that a police pursuit would occur. Officer Brosseau was entitled to consider the potential danger of that police pursuit in assessing the danger Haugen posed to others.

The majority apparently prefers, as a matter of policy, that police departments discourage their officers from pursuing felons in automobiles. If the majority had its way in setting law enforcement policy, no police officer ever would pursue a felon at high speed; the police would surrender, rather than the felon, who would be given a free pass to an easy escape. In my view, the majority errs by allowing its policy preference to corrupt its analysis of the danger Haugen posed to the community by fleeing in a vehicle in a deranged mental state.

Having created a circuit split by misapplying *Garner*, the majority downplays its departure from our sister circuits' decisions by urging that those decisions approved of deadly force in circumstances very different from those presented here. Although every case presents unique facts, the facts in our sister circuits' decisions are similar to the facts here in important respects. In the Sixth, Eighth, and Eleventh Circuit cases, as in this case, a suspect was fleeing from police in an automobile, a machine that can be extremely dangerous when not operated with great care and due regard for the public safety. *See Scott*, 205 F.3d at 871-72; *Smith*, 954 F.2d at 344; *Cole*, 993 F.2d at 1330; *Pace*, 283 F.3d at 1277. In those cases, as in this case, the felon refused orders to halt. *See Scott*, 205 F.3d at 871;

Smith, 954 F.2d at 344; *Cole,* 993 F.2d at 1330; *Pace,* 283 F.3d at 1277. In those cases, as in this case, the felon was behaving in a desperate and unstable manner. *See Scott,* 205 F.3d at 87[illegible] *Smith,* 954 F.2d at 344; *Cole,* 993 F.2d at 1330-31; *Pace,* 283 F.3d at 1277-78. In those cases, as in this case, the felon appeared likely to take extreme steps to avoid capture. *See Scott,* 205 F.3d at 872; *Smith,* 954 F.2d at 344; *Cole,* 993 F.2d at 1331; *Pace,* 283 F.3d at 1277-78. Most importantly, in those cases, as in this case, the felon appeared likely to drive with willful disregard for the lives of others. *See Scott,* 205 F.3d at 872; *Smith,* 954 F.2d at 344; *Cole,* 993 F.2d at 1331; *Pace,* 283 F.3d at 1277-78.[11]

The majority attempts to distinguish our sister circuits' holdings on the ground that police in those cases used deadly force to *end* a dangerous high-speed flight, rather than to prevent a dangerous high-speed flight from commencing. But our sister circuits did not, as the majority implies, require that police officers wait until *after* a suspect has endangered the lives of others before using deadly force. Nor could they have so held. The Supreme Court's *Garner* decision requires courts to determine whether officers have probable cause to believe a suspect will pose a threat of serious physical harm *in the future,* not whether the suspect posed such a danger *in the past. See Garner,* 471 U.S. at 11-12.

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[11] It is worth noting that the suspects in *Scott, Smith, Cole,* and *Pace* were suspected of crimes less serious and less dangerous than the burglary and battery of which Haugen was suspected. *See Scott,* 205 F.3d at 871 (suspect ignored a traffic sign); *Smith,* 954 F.2d at 344 (suspect ran a stop sign); *Cole,* 993 F.2d at 1330 (suspect drove through toll booth without paying); *Pace,* 283 F.3d at 1276 (suspect driving at night without headlights).

At the time Officer Brosseau shot Haugen, Haugen's vehicle had not yet begun to move. But an objective observer would have reasonably concluded that Haugen was embarking on a desperate, potentially deadly, high-speed vehicular flight through residential neighborhoods. That Haugen was only beginning to execute his plan of driving with willful and wanton disregard for the lives of the innocent does not mean, as the majority suggests, that Haugen did not pose a "significant threat of death or serious physical injury" to others. Nothing requires a police officer, like some modern-day Epimetheus, to disregard prospective danger and attend only to dangers that have passed. It was good that Brosseau acted when she did.

Contrary to the majority's suggestion, neither the Seventh Circuit's *Donovan* decision nor the Eleventh Circuit's *Vaughan v. Cox* decision lends support to the majority's novel holding. Both *Donovan* and *Vaughan* are consistent with my view – compelled by the Supreme Court's *Garner* decision that police can use deadly force when necessary to stop a fleeing felon who appears likely to drive with willful disregard for the lives of others. In *Donovan,* the Seventh Circuit held that genuine issues of material fact existed as to whether deadly force was proper when "there [was] no evidence that [the suspect] imperiled anyone (except himself and his willing passenger) . . . [by] driving his motorcycle through empty city streets in the wee hours of the morning." 17 F.3d at 951. Here, by contrast, Haugen's own testimony – describing his attempted high-speed flight through a suburban residential neighborhood in his jeep on a Sunday afternoon – shows that Haugen's conduct would have imperiled many people, both on the scene and in the community, if Officer Brosseau had not reasonably intervened.

In *Vaughan,* the Eleventh Circuit held that genuine issues of material fact existed as to whether deadly force was proper when police shot without warning a fleeing suspect. 264 F.3d 1027, 1031, 1031 n.2 (11th Cir. 2001) (vacated by 536 U.S. 953 (2002), reinstated and supplemented on remand at 316 F.3d 1210 (11th Cir. 2003)). Here, by contrast, it is undisputed that Officer Brosseau effectively warned Haugen that he would be shot if he did not submit to arrest.

Fourth Amendment analysis requires a delicate balancing of individual and societal interests, *Michigan v. Summers,* 452 U.S. 692, 700 n.12 (1981), and an individual's interest in his or her life is of unmatched importance. But when a felon threatens innocent lives in a base attempt to escape responsibility for his or her crimes, police officers do not act unreasonably in using deadly force to protect the community. I would hold that Officer Brosseau did not violate Haugen's Fourth Amendment rights and that the district court properly granted summary judgment in her favor.

* * *

With perhaps the purpose, but certainly not the effect, of obscuring its departure from the Supreme Court's *Garner* standard and our sister circuits' precedents, the majority deploys an array of rhetorical devices that, individually and collectively, serve only to accentuate the weaknesses of the majority's rationale.

First, the majority implies that its holding is consistent with those of our sister circuits. But no other court has ever come close to holding, as the majority holds today, that police may never use deadly force to protect the public from the danger posed by a felon's reckless flight from

police in a vehicle. *See Scott,* 205 F.3d at 877 (holding that police reasonably used deadly force to stop a suspect fleeing in a vehicle); *Smith,* 954 F.2d at 347-48 (same); *Cole,* 993 F.2d at 1330-33 (same); *Pace,* 283 F.3d at 1281 (same). Second, the majority implies that police officers' decision to pursue Haugen in their police cruisers was of dubious legality under Washington law. But it was not; such chases are permissible, though they must be conducted with due care. *See Mason,* 534 P.2d at 1363. Third, the majority states that we cannot properly take judicial notice of the official government statistics I cited to emphasize the dangerousness of high-speed flights by felons from police. But this is incorrect. *See, e.g., Chastleton Corp. v. Sinclair,* 264 U.S. 543, 548 (1924) (Holmes, J.) ("[T]he Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law. . . ."). Fourth, the majority states that the Supreme Court in *Garner* rejected "[the dissent's] kind of general statistical approach." *See supra* at 10608. But I do not use any "general statistical approach," and, in any event, the Supreme Court used statistics in *Garner* in precisely the way I use them here. *See* 471 U.S. at 21. Fifth, the majority states that I do not view the facts in the light most favorable to Haugen. But I have relied only on facts Haugen does not dispute, facts that compel the conclusion that Haugen's fleeing in his vehicle would have posed a significant threat of death or serious physical injury to others.

The majority's artful phrasing and overwrought lucubrations should not and cannot obscure the majority's departure from the Supreme Court's and our sister circuits' law. Acting somewhat as a police commissar for the western states and territories in our jurisdiction, rather

than as a constitutional court, the majority imposes serious and unworkable restrictions on police officers' efforts to bring criminals to justice and to protect the community. I cannot join the majority in that effort.

II

The majority's holding that Officer Brosseau violated Haugen's rights is wrong. But it is not *as wrong* as the majority's holding that those rights were "clearly established" at the time of the shooting. It should be undeniable that Officer Brosseau did not violate Haugen's "clearly established" rights and so was qualifiedly immune from suit.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). If "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," then qualified immunity does not apply. *Saucier v. Katz,* 533 U.S. 194, 202 (2001). But if, on the other hand, "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley,* 475 U.S. at 341.

Officer Brosseau was not plainly incompetent.[12] Nor did she knowingly violate the law. Police officers of reasonable competence could disagree whether deadly force was justified.[13] In fact, federal appeals courts of reasonable

[12] Rather, I would say Officer Brosseau is very competent.

[13] Indeed, the Puyallup Police Department Firearms Review Board concluded, after an investigation, that Officer Brosseau's actions did not violate Washington law or police department policy.

competence *do* disagree on the issue.[14] And judges, unlike police officers, have the luxury of studying the constitutional issues in the calm of their chambers, with the benefit of lawyers' briefing, and after hearing oral arguments. *See Ganwich v. Knapp,* 319 F.3d 1115, 1125 (9th Cir. 2003) ("[J]udges should not expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze Fourth Amendment developments with a law professor's precision.").

The majority holds Officer Brosseau to an unreasonable standard. Officer Brosseau should be commended, not condemned, for acting with courage and decisiveness to protect the public from a dangerous felon in a deranged mental state embarking on a potentially deadly flight from police. I respectfully dissent.[15]

[14] The majority does not disagree only with my dissenting views. The majority also disagrees with the considered wisdom of the Sixth, Eighth, and Eleventh Circuits, which have held there was no Fourth Amendment violation in circumstances similar to those presented here. *See Scott,* 205 F.3d at 877; *Cole,* 993 F.2d at 1330-33; *Pace,* 283 F.3d at 1281.

[15] Despite my dissent, I do not disagree with Parts II.B. and II.C. of the majority opinion, affirming the district court's summary judgment in favor of the City of Puyallup and the Puyallup Police Department, and reversing the district court's dismissal of Haugen's state law claims. I disagree with Part II.A., the majority's Fourth Amendment analysis.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH J. HAUGEN, Plaintiff, v. ROCHELLE BROSSEAU, PUYALLUP POLICE DEPARTMENT, and THE CITY OF PUYALLUP, Defendants.	Case No. C01-5018RJB ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Sep. 24, 2001)

This matter comes before the court on Defendants' Motion for Summary Judgment (Dkt. 19). The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)

(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt.") *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. RELEVANT FACTS

Events leading up to the shooting. On February 20, 1999, defendant Officer Rochelle Brosseau, a City of Puyallup police officer, met with Greg Tamburello at the Puyallup police station. Tamburello reported to Officer

Brosseau that plaintiff Kenneth Haugen had burglarized his shop in an adjacent jurisdiction, and had taken $1,500 in tools. Tamburello also told Officer Brosseau that Haugen was staying at his mother's house in Puyallup. Tamburello told Officer Brosseau that neighbors of Haugen's mother had promised to notify Tamburello when Haugen returned to the home; Tamburello requested assistance from police in apprehending Haugen and retrieving his property. Officer Brosseau contacted the dispatch center and learned that Haugen had a felony no bail warrant for drug-related offenses and other charges. The next day, February 21, 1999, Officer Brosseau learned during initial duty briefing that Haugen had not yet been apprehended.

Haugen and his girlfriend, Deanna Nocera, and her three-year-old daughter spent the night of February 20, 1999, at Haugen's mother's house in Puyallup.

The next day, Haugen began spray painting his Jeep Cherokee while it was parked in his mother's driveway, with the front of the Jeep facing the street. Newspaper had been taped over some of the windows, although Haugen maintains that the front driver's side window was not covered. Haugen's girlfriend, Deanna Nocera, had parked her car facing the Jeep, about three or four feet from the Jeep.

On that morning, February 21, 1999, Tamburello received a call from Haugen's neighbor, Irene Riddle, and learned that Haugen was at his mother's home, which is located in a residential area with fairly narrow streets. *See* Dkt. 20, Exh. 8. Tamburello and a friend, Matthew Atwood, arrived at the home. Tamburello parked his pickup truck about two houses down from Haugen's mother's home and walked up to the Haugen residence while Atwood got in the driver's seat of Tamburello's pickup.

Tamburello and Haugen began to struggle. Atwood pulled up in Tamburello's truck, and parked it so that it blocked Haugen's mother's driveway, effectively preventing Nocera or Haugen's vehicles from being able to exit through the driveway. Atwood and Tamburello tried to get Haugen into the pickup truck so they could force him to return the tools. Irene Riddle then called 911. Officer Brosseau pulled up in a patrol car and parked facing Tamburello's truck. The momentary diversion caused by Officer Brosseau's arrival provided Haugen the opportunity to escape. He elbowed Atwood and tried to get Tamburello's truck keys. Atwood wrestled the keys from Haugen. Haugen then got away and ran through his mother's backyard and hid in the neighborhood.

By this time, other police officers were arriving, and a search began with a canine and handler. Officers requested that Tamburello and Atwood stay inside Tamburello's truck to avoid contaminating the canine search. Deanna Nocera and her three-year-old daughter were asked to stay inside Nocera's car.

About 45 minutes later, another neighbor notified police that she saw Haugen in her backyard. Haugen then ran across his mother's front yard to the driveway where the Jeep Cherokee was parked. The Jeep was parked at a slight angle, facing toward the street, about 4 feet away from the front end of Nocera's car. Immediately in back of Nocera's car, blocking the driveway, was Tamburello's pickup.

When the report was received that Haugen had been spotted, Officer Brosseau and a fellow officer ran toward the area where he had been seen. As Officer Brosseau rounded the front of Haugen's mother's house, she saw

Haugen run out from between the houses, and began to chase him. Haugen got into the Jeep and locked the doors.

Officer Brosseau ran up to the driver's window, with her gun drawn. She had difficulty seeing into the vehicle because the windows were heavily tinted and the interior was darkened due to newspapers covering some windows. She ordered Haugen to open the door and get out of the Jeep. At some point, Haugen locked the door and reached down. Brosseau contends that Haugen reached down toward the floorboard and that she was afraid that he was reaching for a weapon; Haugen claims that he was trying to find his keys.

Officer Brosseau broke the driver's window with her gun, but she had to strike it several times because the tinting film held the shattered glass in place. The versions of the actual shooting then diverge.

Haugen's version of the shooting. Haugen claims that Officer Brosseau's gun went off as she put her arm inside the partially broken window, when the gun slid down his arm and made contact with his left shoulder blade. He believed that the shot was accidental. Dkt. 20, Exh. 6, at 150-152.

Officer Brosseau's version of the shooting. Officer Brosseau stated that she cleared a space through the window and placed the barrel of her gun on Haugen's left temple, yelling at him to get out of the car. Officer Brosseau stated that Haugen was yelling "Go ahead and shoot me! You're gonna have to fuckin kill me!" Dkt. #20, Exh. 2, at 16. Officer Brosseau stated that she saw that Haugen had keys in his hand and was attempting to start the car. *Id.* She stated that she was concerned that, if Haugen were able to start the car and attempt to get

away, he might injure two officers who were close behind her approaching the area on foot; Nocera and her child, who were in the car directly in the path of Haugen's Jeep; and any other citizens who might be in the area. *Id.* She stated that she struck Haugen in the head with her weapon as hard as she could in an attempt to stun him so that he would not drive away until her backup could arrive. *Id.* She stated that she struck him again and reached in, trying to grab the keys, but that Haugen knocked her arm away. *Id.*

Officer Brosseau stated that Haugen then "dived forward" as if to grab something on the floorboard. *Id.* She stated that she was afraid that Haugen would retrieve a weapon, so she jumped back behind the doorpost against the side of the car for a safer position. *Id.* She stated that she was having difficulty seeing into the car due to the tinting and shadow, but the Jeep abruptly lurched forward, spraying gravel. *Id.* She stated that she jumped to the left so that the car would not strike her. *Id.* Officer Brosseau stated that she fired one shot through the rear driver's side window. *Id.*

It is disputed whether the shot was fired just before the vehicle moved, as Haugen contends, or whether the shot was fired shortly after the Jeep had started forward, as defendant claims.

While Officer Brosseau was dealing with Haugen, Tamburello got out of his truck to assist her.

Events that occurred after the shooting. The Jeep veered to the left, missed hitting the car with Nocera and her child in it, traveled across the neighbor's lawn, and took off down the street. Haugen drove about half a block before he realized he had been shot. He stated that he

began holding the bullet hole to prevent blood loss; as a result, he claims that he did not get the Jeep out of third gear. Defendants contend that he drove approximately one mile at high speeds, being chased by police officers, before he stopped the car. He pulled his car over, opened the door and fell out onto the pavement. He suffered a collapsed lung and was airlifted to Harborview Medical Center.

On February 4, 2001, Haugen pleaded guilty to one count of attempting to elude a pursuing police vehicle, under RCW 46.61.024, and was sentenced to 12 months and 1 day in prison.

C. CLAIMS

Haugen claims that (1) Officer Brosseau used excessive force when she shot Haugen in the absence of fear for her or another's life or safety, thereby violating Haugen's Fourth, Fifth, and Fourteenth Amendment rights; (2) The Puyallup Police Department and/or City of Puyallup set a policy that allows the use of excessive force by police officers in Puyallup when they failed to discipline Officer Brosseau for her use of excessive force against Haugen; (3) Officer Brosseau committed assault and battery on Haugen when she shot him without being in fear for her or another's life or safety. Dkt. 12. The amended complaint arguably states claims for outrage and intentional infliction of emotional distress. *Id.* The complaint does not allege negligence. Haugen requests damages, including punitive damages, and costs and attorney's fees pursuant to 42 U.S.C. § 1983. *Id.*

D. STANDARD FOR STATING A CLAIM UNDER 42 U.S.C. § 1983

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

D. ISSUES

1. Is Officer Brosseau entitled to qualified immunity for firing her firearm at Haugen?

2. Are the City of Puyallup and the Puyallup Police Department entitled to summary judgment when Haugen cannot show that a police officer employed by them violated his civil rights?

3. Are defendants entitled to dismissal of state tort claims under RCW 4.24.420 when Haugen pleaded guilty to attempting to elude a pursuing police vehicle, under RCW 46.61.024?

E. DISCUSSION

1. **Is Officer Brosseau entitled to qualified immunity for firing her firearm at Haugen?**

Defendants in a § 1983 action are entitled to qualified immunity from damages for civil liability if their conduct

does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. *Id.* at 819. Whether a reasonable officer could have believed his or her conduct was proper is a question of law for the court and should be determined at the earliest possible point in the litigation. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993).

In analyzing a qualified immunity defense, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* The privilege of qualified immunity is an immunity from suit rather than a mere defense to liability, and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id.*

A. Constitutional Right Allegedly Violated

The first inquiry under *Saucier v. Katz* is whether the facts as alleged constitute a civil rights violation. The use of potentially deadly force implicates the Fourth Amendment protections that guarantee citizens the right to be secure in their persons against unreasonable seizures of

the person. *Tennessee v. Garner*, 471 U.S. 1 (1985). The use of force by police to effect an arrest is properly analyzed under the fourth Amendment. The Fourth Amendment standard is one of objective reasonableness, and does not normally entail any inquiry into the subjective motivations of the officer. *Id.* at 397.

The reasonableness of the forced used to effect a particular seizure is determined by carefully balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The force which is applied must be balanced against the need for that force. *Liston v. County of Riverside,* 120 F.3d 965, 976 (9th Cir. 1997).

Officer Brosseau stated that she discharged the firearm intentionally. In his first amended complaint, Haugen alleged that "[a]ll defendants acted with evil intent or reckless disregard for Mr. Haugen's civil rights." Dkt. #12, at 4. Haugen's speculation during his deposition that the shot may have been fired accidentally is insufficient to overcome Officer Brosseau's statements and sworn testimony that she fired intentionally. There are issues of fact regarding whether the firearm was discharged when Officer Brosseau put her hand inside the driver's side window of the Jeep after she had broken the windshield, or whether the shooting occurred after she stepped away from the vehicle and fired in Haugen's direction through the rear window on the driver's side. For purposes of the qualified immunity analysis, it is irrelevant whether the weapon discharged while Officer Brosseau's hand was inside the car, or whether she had stepped back from the car and fired. Based upon the facts alleged in the complaint, if Officer Brosseau used excessive force during her

attempt to arrest Haugen, he has stated a basis for a constitutional claim under the Fourth Amendment.

B. Clearly Established Right

The second prong of the qualified immunity inquiry turns to whether the right implicated – the Fourth Amendment right to be free from excessive force – is clearly established in the particularized manner set forth in *Saucier v. Katz*. The question is whether it would have been clear to a reasonable officer in Officer Brosseau's position that shooting Haugen violated his Fourth Amendment rights. If not, the force used would not be "excessive" for constitutional analysis purposes.

Police officers may use some degree of physical coercion or threat thereof to effect an arrest. *Graham v. Connor*, 490 U.S. at 396. Deadly force may be used to prevent an escape if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Tennessee v. Garner*, 471 U.S. at 11. The fact that a person is fleeing from arrest for a felony is not itself sufficient to justify the use of deadly force to prevent the escape. *Id.*

Excessive force claims which arise in the context of an arrest or investigatory stop of a free citizen are analyzed under the Fourth Amendment Reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *Tennessee v. Garner*, 471 U.S. at 7; *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994), *cert. denied* 115 S.Ct. 1104 (1995). The reasonableness of defendant's actions depends on factors such as the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is

actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. at 396. The totality of the circumstances of each case must be considered. *Fikes v. Cleghorn*, 47 F.3d 1011, 1014 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d at 806, n. 2.

Defendants claim that Officer Brosseau is entitled to qualified immunity because she was attempting to take Haugen into custody as he was attempting to start the vehicle and flee; she reasonably suspected that he had a weapon in the vehicle; she knew that four persons were present in vehicles only a few feet away from the car Haugen was attempting to start; and she knew that her fellow officers had been alerted and she expected them to arrive at the scene on foot at any moment to assist her. Defendants contend that *Saucier v. Katz*, recognizes that different police officers faced with the same circumstances might handle the problem in different ways, and that it would not have been clear to a reasonable officer in Officer Brosseau's position that her conduct was unlawful in the situation she confronted.

Haugen contends that Officer Brosseau is not entitled to qualified immunity because it would have been clear to a person in her position that firing her weapon at Haugen was unlawful. He claims that he was wanted on warrants involving non-violent crimes; that, although he was actively trying to evade arrest, he used no force to do so, and he did not put any other persons in danger; that his concern once he was in the Jeep was in trying to find his keys and get the Jeep started; and that he ignored Officer Brosseau and her attempts to stun him. He claims that Officer Brosseau actually endangered the people she was trying to protect when she fired her weapon since she was aiming her weapon in the direction of Ms. Nocera and her

child as well as Atwood and Tamburello. He further contends that Officer Brosseau endangered others by firing her weapon at Haugen, thereby increasing the likelihood that he would lose control over his vehicle and injure others in the vicinity. Haugen believes that the safest course for Officer Brosseau would have been to allow him to drive out once the Jeep began moving, and let other police officers pursue him in their patrol cars.

Haugen has provided an affidavit of D.P. Van Blaricorn, a retired law enforcement officer with extensive police experience. Mr. Van Blaricom opined that, based upon his review of records and upon inspections of the scene, vehicle, and the bullet wound, (1) Officer Brosseau did not have reasonable suspicion or probable cause to believe that Haugen was armed; (2) it is conceivable that she shot Haugen, either intentionally or accidentally, through the window she had broken out; (3) in the alternative, after Haugen started his vehicle and began to drive away, (a) she stepped clear of his vehicle and deliberately shot him; (b) Officer Brosseau admitted that he did not pose a threat to her; and (c) Officer Brosseau relied on objectively unreasonable speculation that Haugen might have placed others at risk; (4) Officer Brosseau never had probable cause to believe that Haugen posed a significant threat of death or serious physical injury to anyone; and (5) the investigation by the Puyallup Police Department was not conducted to a reasonable standard of care. Affidavit of D.P. Van Blaricom.

The court has reviewed the affidavit of Mr. Van Blaricom. It is the court's responsibility, based upon review of the record, to determine whether it would have been clear to a reasonable officer in Officer Brosseau's position that her conduct was unlawful in the situation

she confronted. *See Act Up! v. Bagley*, 988 F.2d at 871. Mr. Van Blaricom's conclusions are not relevant to this court's independent determination of qualified immunity based upon the record. Moreover, Mr. Van Blaricom's opinions are of little assistance in the court's decision whether Officer Brosseau is entitled to qualified immunity, for the following reasons:

(1) Whether Officer Brosseau had probable cause to believe that Haugen was armed is not the issue; Mr. Van Blaricom's opinion on probable cause does not overcome the facts of Officer Brosseau's state of mind as attested by her. Her suspicion that Haugen had a weapon is entirely reasonable under the circumstances presented here: He was a fleeing, resisting felon who took lengths to reach his car and appeared to reach for something out of sight on the floor as Officer Brosseau was trying to arrest him.

(2) Whether it is conceivable that Officer Brosseau may have fired the shot through the window she had broken out is not relevant to the qualified immunity analysis.

(3) Whether (a) Officer Brosseau stepped clear of Haugen's vehicle and deliberately shot him and, whether (b) Officer Brosseau admitted that he did not pose a threat *to her* at the moment she fired the shot from outside the car, are not relevant to the qualified immunity analysis; and (c) Mr. Van Blaricom's opinion that Officer Brosseau relied on objectively unreasonable speculation that Haugen might have placed others at risk does not overcome the evidence to the contrary.

(4) Whether Officer Brosseau had probable cause to believe that Haugen posed a significant threat of death or serious physical injury to anyone is not the issue: Mr. Van Blaricom's opinion on probable cause does not overcome

the facts of Officer Brosseau's state of mind as attested to by her.

(5) The investigation conducted by the Puyallup Police Department is not relevant to the issue of qualified immunity.

The court views the facts from the perspective of a reasonable officer in Officer Brosseau's position, and must determine, from the evidence presented, whether it would have been clear to Officer Brosseau that her conduct was unlawful in the situation she confronted. Mr. Van Blaricom's opinion is of scant assistance to the court in its determination of qualified immunity. Opinions do not overcome sworn statements of fact.

Haugen's excessive force claim should be analyzed under the *Graham v. Connor* factors. *See also Saucier v. Katz*, 121 S.Ct. at 2158.

Severity of the crime at issue. Officer Brosseau knew that Haugen was wanted on a no bail felony warrant for a drug crime and other crimes as well. A no bail felony warrant for a drug crime is a serious matter. At the time Officer Brosseau shot him, she also knew that Haugen was the chief suspect in the Tamburello burglary. Haugen disputes whether there was an actual burglary, and contends that he had an ownership interest in the tools. Whether the crime of burglary actually occurred is not relevant; what is relevant is the information Officer Brosseau had at the time of the incident. It is undisputed that Haugen was attempting to resist and elude arrest at the time Officer Brosseau fired her weapon.

Whether the suspect poses an immediate threat to the safety of the officers or others. Haugen was attempting to

flee from police at the time the shooting occurred. Whether Officer Brosseau directly ordered Haugen to stop trying to start the car, her actions clearly communicated to him that she wanted him to stop trying to start the car and get out. He had felony "no bail" warrants. He got in his Jeep, and attempted to flee. Officer Brosseau, due to the poor lighting inside the Jeep, had difficulty seeing inside, but she was able to see that, at the least, Haugen was trying to put his hand on something out of her sight. She could reasonably have believed that Haugen was searching for a weapon. She broke the glass and stuck her hand inside the window. It was at that point either that the weapon automatically discharged or that she put the gun to Haugen's head and ordered that he get out of the Jeep. Haugen did not comply with the order, whether it was made orally or by her actions. He attempted to drive the Jeep away from the scene. There was no path open to him on the driveway, which was blocked by Nocera's and Tamburello's occupied vehicles. Assuming that Officer Brosseau intentionally fired a shot from outside the Jeep, she knew that Haugen was fleeing, that there were several individuals either on foot or in vehicles in very close proximity to Haugen's Jeep. In fact, Haugen drove across yards to get away from the area. Assuming that the weapon accidentally discharged, Haugen posed a threat to Officer Brosseau when she could have reasonably suspected that he was reaching for a weapon. Assuming that Officer Brosseau intentionally fired the weapon after she had stepped back from the Jeep, she could reasonably have believed that Haugen was a danger to other persons, including people in the immediate area as well as those who might be in the path of his vehicle as he tried to get away through the residential area. Even construing all of the facts in Haugen's favor, he posed a threat to Officer

Brosseau and/or to other persons at the time the weapon was fired.

Whether the suspect is actively resisting arrest or attempting to evade arrest by flight. It is undisputed that Haugen was attempting to avoid being arrested by the police. While he claims that he was not guilty of stealing tools from Tamburello, Haugen knew that he had outstanding warrants (Declaration of Randy Loun, Exh. A, at 81). He was actively resisting arrest and was attempting to evade arrest by flight.

The court is mindful of a recent decision by the Ninth Circuit U.S. Court of Appeals, *Deorle v. Rutherford*, 2001 WL 994767 (9th Cir. (Cal.), 2001. In that case, the court held that a police officer who deliberately shoots an unarmed individual with a cloth-cased shot at close range without warning was not entitled to qualified immunity. Here, Haugen was attempting to flee from officers attempting to arrest him. There were people near the Jeep he was attempting to flee in, in vehicles and on foot. Officer Brosseau knew that her back up officers were arriving. Haugen drove his Jeep away across yards in an attempt to escape. Brosseau made a split second decision, either (1) to break the driver's side window and thrust her hand and weapon inside the cab of the Jeep, where the weapon fired accidentally; or (2) after breaking the window and thrusting her hand and weapon into the Jeep to arrest Haugen, to step away and fire into the driver's side window in the direction of Haugen. Because police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation, in circumstances that are tense, uncertain, and rapidly evolving, the reasonableness of an officer's belief as to the appropriate level of force should be judged from that on-scene

perspective. *Saucier v. Katz*, 121 S.Ct. at 2158. In this situation, it would not have been clear to a reasonable officer in Officer Brosseau's position that her conduct was unlawful in the situation she confronted. She is entitled to qualified immunity on Haugen's claim of excessive force.

2. **Are the City of Puyallup and the Puyallup Police Department entitled to summary judgment when Haugen cannot show that a police officer employed by them violated his civil rights?**

In order to set forth a claim against a municipality under 42 U.S.C. § 1983, a plaintiff must show that the defendant's employees or agents acted through an official custom, pattern or policy that permits deliberate indifference to, or violates, the plaintiff's civil rights; or that the entity ratified the unlawful conduct. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978); *Larez v. City of Los Angeles*, 946 F.2d 630, 646-47 (9th Cir. 1991).

Haugen claims that the City of Puyallup/Puyallup Police Department conducted an inadequate investigation into this incident that resulted in findings that exonerated Officer Brosseau. Haugen contends that the municipalities thereby ratified Brosseau's unlawful conduct.

In order to establish municipal liability, a plaintiff must demonstrate a direct causal link between a municipal action and the deprivation of federal rights. *Bryan County v. Brown*, 117 S.Ct. 520 U.S. 397 (1997). If there is no constitutional violation, a necessary element of municipal liability is lost. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Therefore, defendants have shown that there is no material issue of fact regarding the claims

against the City of Puyallup and Puyallup Police Department, and they are entitled to judgment as a matter of law. Defendants' motion for summary judgment should be granted on this issue.

3. **Are defendants entitled to dismissal of state tort claims under RCW 4.24.420 when Haugen pleaded guilty to attempting to elude a pursuing police vehicle, under RCW 46.61.024?**

In his first amended complaint, Haugen alleges that Officer Brosseau committed assault and battery. Dkt. #12, at 4. There are also arguably tort claim for outrage and intentional infliction of emotional distress. *Id.*

Under 28 U.S.C. § 1367, a federal court may assume supplemental jurisdiction over all other claims that are so related to claims in the action within the original jurisdiction so that they form part of the same case or controversy.

RCW 4.24.420 provides as follows:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. § 1983.

Defendants maintain that Haugen was committing a felony offense of eluding at the time he was injured, that the felony was caused by Haugen's attempt to elude Officer Brosseau. RCW 46.61.024 provides in relevant part as follows;

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

The signal to stop may be given by an officer other than one in the pursuing police vehicle. *State v. Stayton*, 39 Wn.App. 46, 49-50 (1984). Here, Officer Brosseau unequivocally signaled to plaintiff to stop trying to flee in the Jeep and get out.

Haugen claims that he was shot at virtually the same moment that the Jeep began to move, and that, although Haugen eventually plead guilty to felony eluding, he was not committing the offense at the time he was shot, but after the shot had been fired. This argument is disingenuous. Officer Brosseau had repeatedly told Haugen to stop and get out of the Jeep before the shot was fired. She had attempted to stop him from driving the Jeep away by breaking the window with repeated blows. The weapon was fired, either accidentally or intentionally, in response to Haugen's failure to stop. When the shot occurred is not relevant because it is not in dispute that Haugen was attempting to flee in his Jeep before his was shot. Even if the shot was fired at the same time the Jeep began to move, or momentarily before, Haugen had initiated a

resistive and evasive course of action by putting the keys in the ignition and starting the Jeep.

Haugen also claims that there is a factual dispute as to whether Haugen was driving in such a way as to indicate a wonton or willful disregard for the lives or property of others at the time he was shot. Haugen admitted at his deposition that he was "standing on the gas" as he swerved to miss his girlfriend's car, drove through the small, tight space, and across his neighbor's front lawn, only a short distance away from Tamburello who he believed was trying to come to Officer Brosseau's aid. Dkt. 20, Exh. 6, at 160-62. There does not appear to be a factual dispute as to whether Haugen drove in such a way as to indicate a wonton or willful disregard for the lives or property of others at the time he was shot.

Officer Brosseau gave Haugen signals to stop his vehicle by her words and/or actions; Haugen drove the vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while he was attempting to elude a pursuing police vehicle. He was committing the crime of felony eluding at the time of his shooting, in violation of RCW 46.61.024. The felony eluding under RCW 46.61.024 was a proximate cause of the injury, the bullet wound. This series of events that involved resisting arrest, attempting to flee, and actually fleeing, is a complete defense to an action for damages for personal injury under RCW 4.24.420. Defendants have shown that there is no material issue of fact as to Haugen's state law claims, and they are entitled to summary judgment on these claims.

Therefore, it is hereby

ORDERED that Defendants' Motion for Summary Judgment (Dkt. 19) is **GRANTED**. This case is **DISMISSED WITH PREJUDICE**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known addresses.

DATED this 24 day of September, 2000.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States
District Judge

AMER
RECORDS
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 7 - 2004
OFFICE OF THE CLERK

No. 03-1261

IN THE

Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,
Petitioner,

v.

KENNETH J. HAUGEN,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

RANDY W. LOUN
LAW OFFICE OF RANDY W. LOUN
509 4th Street, Suite 6
Bremerton, WA 98337
(360) 377-7678

Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that there is a triable issue of fact as to whether petitioner Rochelle Brosseau's use of deadly force in shooting respondent Kenneth Haugen in the back as he started his jeep to flee the scene was objectively unreasonable and therefore violated the Fourth Amendment, when, viewing the evidence in the light most favorable to him, Haugen was not suspected of committing a violent crime, did not act in an aggressive manner toward Brosseau or anyone else, did not wield a weapon, had only just started his jeep's engine at the moment he was shot, and had a clear path of escape with no officers in his way.

2. Whether the court of appeals also correctly ruled that Haugen's Fourth Amendment right to be free from the unreasonable exercise of deadly force under these circumstances was clearly established at the time of the shooting, under the standards governing the use of force announced in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), and other case law establishing that a law enforcement officer is not entitled to shoot a suspect merely because he is seeking to evade arrest by fleeing in a vehicle, unless the officer has a reasonable, objective basis for believing that the suspect poses a threat of death or serious physical harm to the officer or others.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Rochelle Brosseau shot respondent Kenneth Haugen in the back, puncturing his lung, as he tried to flee from police in his Jeep Cherokee. A panel of the Ninth Circuit properly held that Brosseau was not entitled to summary judgment on qualified immunity grounds, concluding that the evidence, taken in the light most favorable to Haugen, did not even "present a borderline case." 351 F.3d 372, 392 (9th Cir. 2003). Viewed in Haugen's favor, the record contains evidence that Brosseau shot Haugen in the back even though he had committed no crime indicating that he posed a significant threat of serious physical harm to Brosseau or others; that Brosseau had no objectively reasonable basis to believe either that Haugen had a gun or that other officers stood in the path of Haugen's jeep; that Haugen did not display any aggressive behavior toward Brosseau or anyone else as he endeavored to flee the scene; and that Haugen had only just started his vehicle's engine at the moment he was shot and had a clear path of escape down a driveway.

Brosseau and her amici States and peace officers claim that the court of appeals' fact-bound ruling creates a split among circuits that have addressed the lawfulness of an officer's use of deadly force to halt a felon escaping arrest in a vehicle, that the court's decision fails to apply the qualified immunity analysis required by this Court's precedents, and that the decision portends a new era in which § 1983 actions charging law enforcement officers with the unreasonable use of deadly force will routinely be sent to trial in the Ninth Circuit.

There is no merit to any of these arguments. In contrast to such cases as *Siegert v. Gilley*, 500 U.S. 226 (1991), and *Saucier v. Katz*, 533 U.S. 194 (2001), in which this Court granted certiorari "in order to clarify the analytical structure under which a claim of qualified immunity should be addressed," *Siegert*, 500 U.S. at 231, this case presents no such analytical or other important legal question to resolve. It is undisputed that the court of appeals enunciated the correct two-

part legal standard established in *Saucier v. Katz*, 533 U.S. 194 (2001), for determining whether a law enforcement officer is entitled to summary judgment on qualified immunity grounds: first, whether, "'[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right'"; and, if yes, second, "'whether the right was clearly established such that it would be clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted.'" 351 F.3d at 380-81 (quoting *Saucier*, 533 U.S. at 201-02). The only question presented by the petition is the correctness of the court of appeals' application of that settled legal standard to a particular set of facts, based on the record before it, and such a question is rarely, if ever, a reason to grant review. *See* S. Ct. R. 10.

Nor does the court of appeals' ruling create a split in the circuits. Although petitioner and her amici attempt to portray the Ninth Circuit's decision as "completely at odds with every other circuit court that has considered the Fourth Amendment issue," Cert. Pet. 2, that claim is unfounded. As the court of appeals correctly recognized, the cases on which Brosseau relies involve strikingly different facts—high-speed car chases in which suspects deliberately attempted to ram police vehicles and endangered other drivers or pedestrians on the road. As discussed below, in more analogous cases, the circuits have ruled that an officer violates the Fourth Amendment if he shoots a suspect about to flee in an automobile without some reasonable basis to believe that the suspect actually poses a threat of serious physical harm to the officer or others.

Finally, Brosseau's policy argument—that officers will be denied qualified immunity at early stages of the litigation and will be forced to go to trial in every deadly force case in the Ninth Circuit—has already proved to be unfounded. In the 11 months since the panel's decision was handed down, the court of appeals has already held that law enforcement officials accused of unlawful use of deadly force were entitled to

summary judgment, including in cases involving vehicular flight. More importantly, Brosseau's policy argument carries little weight in this case. If *Haugen* is not entitled to a jury trial to gauge the reasonableness of Brosseau's decision to shoot him, then it is difficult to envision *any* victim of the use of deadly force who would be entitled to press a claim. The Ninth Circuit's decision turns on its own facts, and there is no basis for further review.

STATEMENT

Brosseau contends that "[t]he factual specifics are not disputed," Cert. Pet. 3, but then proceeds to describe several key facts as reported by Brosseau, even though they are disputed by Haugen and other witnesses at the scene. Similarly, Brosseau's and amici's factual recitations rely on events and information, designed to elicit sympathy for Brosseau's conduct, that unfolded or came to light only *after* the shooting—such as the fact that Haugen had "a lengthy criminal history," *id.* at 5, and a history of methamphetamine use. Amicus Br. of Police Officers Research Association of California Legal Defense Fund et al. ("Peace Officers Amicus Br.") 3-4. Viewed in the light most favorable to Haugen, the party resisting summary judgment, *see Saucier*, 533 U.S. at 201, and evaluated at the time Brosseau actually fired her gun, the key facts are as follows.

On February 20, 1999, the day before the shooting, Greg Tamburello visited the City of Puyallup, Washington police station to report an alleged burglary of his business in a neighboring town by former associate Kenneth Haugen. Tamburello spoke to Brosseau and accused Haugen of stealing $1500 worth of equipment. Brosseau directed Tamburello to file a report with the neighboring county sheriff's department. She checked computerized records and learned that Haugen had an outstanding "felony no bail warrant" for UPCS (unlawful possession of a controlled substance). "Garrity"

Statement of Officer Brosseau ("Brosseau Statement") 13. She knew nothing else about his criminal or drug-use history. Interview of Officer Brosseau ("Brosseau Interview") 20.[1]

The next day, on February 21, Brosseau was dispatched to a fight in progress in the driveway of Haugen's mother's house. The dispatch report was that two unarmed men were fighting on the ground. Brosseau Statement 13. When Brosseau arrived at the scene, she observed Tamburello, Haugen, and a third man, Matt Atwood, who was assisting Tamburello, heading toward Tamburello's black pickup truck, which was parked at the foot of the driveway. *Id.* at 14. According to Haugen and other observers, Tamburello and Atwood were forcibly dragging Haugen into the truck. Deposition of Kenneth Haugen, Vol. 1 ("Haugen Depo."), 116, 120; Interview of Kenneth Haugen ("Haugen Interview") 39; Interview of Matthew Atwood ("Atwood Interview") 53-54; Interview of Irene Riddle ("Irene Riddle Interview") 64. Deanna Nocera, Haugen's girlfriend, who was on the scene and had witnessed the altercation, reported to Brosseau at some point before the shooting that Tamburello had assaulted Haugen in the driveway. Brosseau Statement 15; *see* Interview of Deanna Nocera ("Nocera Interview").

Brosseau approached the truck, and Haugen took advantage of the momentary distraction to jump out of the truck and run up the driveway and behind the houses. Brosseau Statement 14; Haugen Depo. 120-23; Haugen Interview 41; Atwood Interview 55; Irene Riddle Interview 64; Nocera Interview. Tamburello told Brosseau that the man who had run by was Haugen. Brosseau Statement 14. Brosseau

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[1] Materials from the summary judgment record are identified herein by the titles appearing on the documents. The documents will be cited by their bate-stamped page numbers, where page numbers are provided. The Deposition of Kenneth Haugen, Vol. 1, will be cited according to transcript page.

noticed that a Jeep Cherokee was sitting in the driveway, in the process of being spray painted bright yellow. *Id.* The jeep was facing the street, angled diagonally toward the left. Nocera Interview; Haugen Depo. 115 & Exh. 3 (diagram). Also on the driveway, in front of and facing the jeep, was Deanna Nocera's small red car. Brosseau Statement 14, 15; *see also* Haugen Depo., Exh. 3 (diagram); Photographs Taken by Police Investigators ("Police Photographs") 34-37. The driveway was 20 feet wide. Haugen Depo. 137. The jeep was parked about four feet away from Nocera's car and 20-30 feet away from Tamburello's pickup truck at the foot of the driveway. Haugen Depo. 115, 137; Atwood Interview 58. The alignment of the vehicles left a clear exit path for the jeep down the left side of the driveway. Haugen Depo. 160 & Exh. 3; Haugen Interview 44; Police Photographs 34-37.

Brosseau did not immediately give chase, but requested a K-9 unit and told the Riddles, who lived next door, to stay in their house; Tamburello and Atwood to remain in Tamburello's pickup truck; and Nocera and her three-year-old daughter to remain in the red car. Brosseau Statement 14; Atwood Interview 55. Two officers arrived on the scene with a K-9 to help track down Haugen, and a search ensued over the next half hour or 45 minutes. Brosseau Statement 14-15; Atwood Interview 56; Puyallup Police Department Case No. 99-01392 ("Police Report"), at 5. Eventually, Officer Subido radioed from down the street that a neighbor on the side of Haugen's mother's house away from the driveway had seen a man in her backyard. Brosseau Statement 15. Brosseau ran in that direction. Haugen then ran out from between the houses, ahead of her. He ran past the front of his mother's house and then turned and ran up the driveway. As Brosseau followed, Haugen entered the jeep from the driver's side and closed the door. *Id.* Brosseau said she at first believed Haugen was going to the jeep for a weapon because she "could see no other purpose for his trying to hide in that vehicle." *Id.*

Brosseau ran to the driver's side door, with her handgun drawn, but the door was locked. She pointed her gun at Haugen and ordered him to stop. *Id.* at 15-16. Haugen began fumbling for his car keys. Haugen Depo. at 143, 145, 147; Haugen Interview 42-43. Brosseau hit the driver's side window several times with her handgun, and on the third or fourth try, the window broke. Brosseau Statement 16; Brosseau Interview 21-22; Haugen Interview 43; Haugen Depo. 147-49; Atwood Interview 58; Interview of Greg Tamburello ("Tamburello Interview"). Although Brosseau was yelling orders at Haugen to get out of the car, Haugen remained silent, focused on retrieving his car keys.[2] Brosseau claimed that she saw Haugen reach down toward the front seat's floorboard and that she feared he might be reaching for a weapon, but when she broke the window, she saw that Haugen had only keys in his hand and was putting one into the ignition. Brosseau Statement 16. Brosseau had pepper spray and a baton, but did not use them. Brosseau Interview 31. Instead, she struck Haugen on the side of his head with the barrel and butt of her gun. Brosseau Statement 16; Brosseau Interview 23; Haugen Interview 43. Haugen did not raise his arm to deflect another blow, but "seemed strangely focussed on his actions." Brosseau Statement 16.

Brosseau struck Haugen again and reached in to try to grab

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[2] Brosseau claimed in her Statement (at 16) that Haugen yelled "Go ahead and shoot me! You're gonna have to fuckin kill me!" In her later interview, however, Brosseau did not repeat this account of Haugen's words, but described Haugen's response to her commands as "looking straight forward and focusing on putting the keys into the ignition." Brosseau Interview 22. Haugen denied saying anything, Haugen Depo. 146, 148; Haugen Interview 46, and other witnesses nearby who overheard Brosseau did not hear Haugen say a word, but saw him concentrating on looking for his keys and starting up the jeep. Atwood Interview 57; Interview of Aaron Riddle ("Aaron Riddle Interview") 72.

the car keys out of the ignition, but at that instant, Haugen succeeded in starting the jeep. *Id.*; Brosseau Interview 24-25. Brosseau later contended that at the moment the engine started, she saw Haugen dive forward as if to grab something, such as a weapon, from the floorboard. Brosseau Statement 16; Brosseau Interview 24-25. However, according to Haugen's account of his actions in the jeep, Haugen Depo. 146-49; Haugen Interview 43, which is consistent with descriptions given by other witnesses, *e.g.*, Atwood Interview 57, 59; Nocera Interview, Haugen never made any such movement, but simply fumbled with his keys and eventually started up the jeep.

At the moment that the jeep's engine started, Brosseau jumped left and fired one shot through the rear driver's side window at a forward angle at Haugen (and thus toward the street), hitting him in the back. Brosseau Statement 16.[3] She admitted that at the time she shot him, she did not believe that there was an immediate threat to her life and was not worried that Haugen would use a weapon against her. Brosseau Interview 29. And, indeed, Brosseau never saw a weapon. Brosseau said she shot Haugen because of "his driving, more than anything else." *Id.* Although Brosseau said she did not believe "he could see where he was going" because of the newspaper supposedly covering the front windshield, *id.*; Brosseau Statement 14, the windshield was *not* covered. Atwood Interview 54; Haugen Depo. 144-45; Tamburello Interview. Indeed, Atwood was watching Haugen through the

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[3] Initially, before the forensics report was complete, Haugen speculated that Brosseau had accidentally fired her gun when she was striking Haugen through the broken driver's side window. Haugen Depo. 150-53. The forensics report confirmed Brosseau's account, however, that she shot Haugen through the driver's side rear window and not at point-blank range. KMS Forensics Laboratory Report 44-45.

windshield as events unfolded. Atwood Interview 57.

Brosseau also maintained that Haugen was "driving in an erratic manner." Brosseau Interview 29. Yet by all witness accounts, Brosseau either shot Haugen at the exact same time the engine started, Haugen Depo. 153; Aaron Riddle Interview 72; Irene Riddle Interview 65, or within an instant of its starting before the jeep had traveled more than a few feet. Atwood Interview 60; Tamburello Interview; Nocera Interview; Interview of Florence Ledbetter. She claimed to be fearful for other officers on foot, for the occupied vehicles in Haugen's path, and for any other citizens who might be in the area. Brosseau Statement 16; Brosseau Interview 25. She admitted, however, that she could not see any other officers in the area. Brosseau Interview 26. From his vantage point in the pickup truck at the foot of the driveway, Atwood confirmed that the other officers were still in the neighbor's backyard and not in front by the street. Atwood Interview 56.

Haugen kept driving. He turned his wheels to the left and steered his jeep, already angled in that direction, toward the left, around his girlfriend's car. Atwood Interview 59-60; Haugen Interview 44. Although it was a "small, tight space," there was still "plenty of room for a car to drive by," Haugen Depo. 160, and he had a "clear, straight shot right through there." Haugen Interview 44. Photographs of the scene bear out Haugen's claim, as they reflect that there was plenty of room for the jeep to drive away without striking Nocera's car or Tamburello's pickup truck. *See* Police Photographs 34-37. As Haugen began to drive, Tamburello backed his truck up several feet to try to prevent Haugen from leaving. Tamburello Interview; Haugen Interview 49. Haugen drove the jeep across the neighbors' lawn, avoided the pickup truck, and reached the street without hitting anything. Haugen Depo. 160, 162; Nocera Interview; Irene Riddle Interview 65.

The police pursued him for less than a mile. Haugen Depo. 166. After about a half block, Haugen realized that he

had been shot. He was unable to shift his jeep out of third gear because he was trying to stop the blood by holding the bullet hole with his right hand, and so his speed did not top 45 miles per hour. *Id.* at 162-64, 166. Haugen was having difficulty breathing; he stopped the jeep and fell out the driver's door onto the pavement. *Id.* 167. The sergeant who pursued Haugen and approached him after he stopped appeared "bewilder[ed]" to discover that Haugen had been shot. *Id.*; *see also* Police Report 5, 10. Haugen suffered a collapsed lung and was airlifted to a hospital. He survived the shooting and subsequently pleaded guilty to attempting to elude a pursuing police vehicle in violation of Wash. Rev. Code § 46.61.024.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND CREATES NO SPLIT IN THE CIRCUITS ON THE LEGALITY OF THE USE OF DEADLY FORCE UNDER THE FOURTH AMENDMENT.

A. Consistency with this Court's Precedents

Brosseau contends that the Ninth Circuit's decision is inconsistent with this Court's cases, arguing that the court of appeals not only viewed the facts in the light most favorable to Haugen, but assumed the ultimate legal conclusions in Haugen's favor as well. Cert. Pet. 17. Similarly, the amici States fault the court for adopting a "total scene perspective" based on facts and circumstances beyond Brosseau's knowledge. Amici Br. of Washington et al. ("States Amici Br.") 4-5. These criticisms are unfounded. Although the court of appeals construed the facts in the light most favorable to Haugen, as this Court requires, *Saucier,* 533 U.S. at 200, 201, its opinion painstakingly considered the factors bearing on Brosseau's use of force—Haugen's prior crimes, potential

weapon, and impending escape in a vehicle—from the perspective of "the objective facts and circumstances *known to Brosseau* at the time she acted." *E.g.*, 351 F.3d at 387 (emphasis added).

As this Court has recognized, the Fourth Amendment protects persons "against unreasonable . . . seizures" and thus prohibits the use of excessive force by police in the course of arresting individuals suspected of crimes. *Graham*, 490 U.S. at 394. "The 'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Id.* at 395. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court announced the constitutional rule governing when police officers may use deadly force. The Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11. Deadly force is permissible in limited circumstances, however:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12; *see also Graham*, 490 U.S. at 396 (the reasonableness of the use of force turns on "the severity of the crime at issue, whether the suspect poses an immediate threat

to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

Here, the Ninth Circuit carefully analyzed from Brosseau's perspective whether the decision to shoot was objectively reasonable—in other words, whether it was reasonable for Brosseau to believe that Haugen "pose[d] a significant threat of death or serious physical injury to the officer or others." 351 F.3d at 381 (quoting *Garner*, 471 U.S. at 3). As the court of appeals found, on Haugen's version of the facts it was objectively unreasonable for her to shoot.

First, at the time of the shooting, Brosseau did not have probable cause to believe that Haugen had committed a crime involving "the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11. Haugen was accused by Tamburello, his former business partner, of burglary, the nonviolent property crime also at issue in *Garner*. As this Court acknowledged in *Garner*, "[w]hile we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force." *Id.* at 21. Brosseau also knew that Haugen had an outstanding warrant for drug possession. There was nothing in Haugen's criminal history of which Brosseau was aware at the time of the shooting that would suggest that Haugen had *ever* committed a violent crime. *See* 351 U.S. at 382-83. Moreover, Haugen was unarmed and did not react aggressively toward Brosseau even when she hit him in the head with her handgun. He did not menace Brosseau or anyone else with his jeep—such as by swerving at or attempting to ram vehicles in the area. Nor did Haugen shout out any crazed invitations to Brosseau to shoot him in order to stop him. He remained silent, intent on starting up the jeep.

Second, Brosseau said she believed at several different points that Haugen might have a weapon in his jeep. But by the time she approached the jeep and observed Haugen trying to start it and struck him with her gun, she could see that he had

not retrieved a weapon. Just as Haugen started the car, Brosseau said again that Haugen dived forward as if to grab something, such as a weapon, on the floorboard. Brosseau admitted, however, that at the time she shot Haugen, she was not worried that he would use any weapon against her, and in fact, Haugen retrieved none. More importantly, however, the factual basis of Brosseau's stated fear of a weapon is that Haugen dove forward as he started the car. Her claim that Haugen made this gesture, however, is disputed. Taking the facts in the light most favorable to Haugen, he did not dive forward, but instead sat in his jeep fumbling with his keys until he was able to get the jeep started. *See id.* at 383.

Third, Brosseau claimed that she shot Haugen because he "was driving in an erratic manner," and she feared Haugen would injure officers or others when he tried to escape in his jeep. Yet, as the court of appeals correctly recognized, the officer's statement that Haugen was driving erratically was not supported by the evidence regarding the timing of the shooting. Haugen and the other bystanders agree that Brosseau shot him at either the moment the jeep moved or within an instant after the jeep started. Thus, at the time Brosseau fired, taking the evidence in the light most favorable to Haugen, he either was not driving at all or the jeep had barely "started to roll." Nocera Interview. She also claimed that Haugen's driving was especially dangerous because the front windshield was covered with newspaper so that he could not see where he was going. Yet again, the evidence taken in Haugen's favor was that the windshield was *not* covered. 351 F.3d at 385-86. Brosseau now argues that Haugen's alleged reckless driving after he was shot, culminating in his guilty plea to attempting to elude a police vehicle, also validates her decision to shoot. Cert. Pet. 3, 15, 19. Yet the manner in which Haugen drove *after* he was shot is irrelevant to the reasonableness of Brosseau's decision

to fire.[4] If Haugen's subsequent conduct can be used to test the reasonableness of Brosseau's decision to shoot, then surely the fact that he drove easily around the supposed obstacles in his path and escaped to the street without hitting anything or anyone is even more significant, especially given that Brosseau's main reason for shooting Haugen was the danger he purportedly posed to the vehicles or people in his path.

Brosseau contended that she was fearful for officers on foot whom she believed were in the area and the occupied vehicles in the jeep's path. Yet, again, taking the facts in the light most favorable to Haugen, *there were no officers on foot* in front of the driveway; the other two officers were still behind the houses. Brosseau admitted she did not see any other officers when she fired. It is not an unfair "total scene perspective," States Amici Br. 4-5, for the court of appeals to find that there was no objective basis to support Brosseau's fear for the safety of her fellow officers. 351 F.2d at 386-87. When she shot Haugen, she was alongside the driver's rear window, firing in a forward direction. There was no reason that she would not have been able to see whether other officers were in the vicinity.

Brosseau likewise had no objective basis to fear for the safety of Nocera in her red car or Tamburello and Atwood in the pickup truck. Brosseau knew that Nocera was Haugen's girlfriend and had no reason to believe he would want to harm her. The wheels of Haugen's jeep were also angled left so that he could easily drive around Nocera's red car. Tamburello and

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[4] Indeed, the court of appeals rejected Brosseau's defense to Haugen's state-law claim—that Haugen was injured while engaged in the commission of a felony—because, construing the facts in Haugen's favor, it appeared that Brosseau shot Haugen *before* he had begun to "drive his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others." 351 F.3d at 394. There was no dissent on this point.

Atwood, on the other hand, were so obviously not threatened with any serious physical harm by Haugen's jeep that Tamburello actually *backed up* his truck in an effort to block Haugen as he started the jeep. Taken in the light most favorable to Haugen, the court of appeals was right to point out that Haugen had a "clear, straight shot" out of the driveway and that the photographs from the scene further demonstrated that Haugen had more than enough room to drive away without striking either Nocera's car or Tamburello's truck. *Id.* at 386. The court's analysis does not depend on hindsight, Cert. Pet. 4; States Amici Br. 5-7, but on the facts "evaluated as of the time Brosseau actually fired her gun." 351 F.3d at 391. The officer had no objectively reasonable basis to support her belief that Haugen's escape from the driveway posed a significant risk of death or serious injury to the people in the car or the pickup truck. *Id.* at 386.

That Brosseau fired in a forward direction, through the driver's side rear window toward Haugen in the driver's seat—when she claimed to fear that people were in the way of the jeep—underscores the unreasonableness of her conduct. The passengers inside the vehicles and the (nonexistent) officers supposedly in the jeep's path were in far greater danger from Brosseau's bullet than they were from the jeep. *See, e.g., Hernandez v. City of Miami,* 302 F. Supp. 2d 1373, 1380-81 (S.D. Fla. 2004) (denying summary judgment to officer who fired from inside the patrol car through the suspect car's open passenger window, "increasing the risk that someone else might be shot" because of the officer's "limited line of sight from inside the car"). Brosseau's decision to shoot is more credibly viewed as the product of frustration at being unable to stop Haugen from escaping than an action grounded on a legitimate concern for the safety of others in front of the jeep.

In sum, the Ninth Circuit's review of the summary judgment record amply supports its conclusion that a reasonable jury could find that Brosseau violated the Fourth

Amendment when she shot an unarmed, nonaggressive man in the back. 351 F.3d 391. Consideration of such a fact-specific question by this Court is wholly unwarranted.

B. Circuit Cases

In an effort to portray this case as involving something more than the application of law to a particular set of facts, Brosseau argues that the court of appeals' decision creates a split in the circuits regarding the lawfulness of the use of deadly force under the Fourth Amendment to stop a suspect who is about to escape by vehicle. Cert. Pet. 13-17. This claim is demonstrably unfounded. As this Court has pointed out, that courts reach different answers as to whether particular applications of force are excessive follows from "the nature of a test which must accommodate limitless factual circumstances." *Saucier,* 533 U.S. at 205.

Brosseau and her amici cite several circuit decisions holding that the danger presented by suspects engaged in high-speed pursuits can justify the use of deadly force. *See* Cert. Pet. 15-16 (citing *Scott v. Clay County,* 205 F.3d 867 (6th Cir. 2000); *Smith v. Freland,* 954 F.2d 343, 347-48 (6th Cir. 1992); *Cole v. Bone,* 993 F.2d 1328 (8th Cir. 1993); *Pace v. Capobianco,* 283 F.3d 1275 (11th Cir. 2002)). Each of these decisions, as the Ninth Circuit recognized, is strikingly distinguishable. *See* 351 F.2d at 389.

In *Smith,* the Sixth Circuit held that an officer was justified in using deadly force after the suspect led police "on a wild chase at speeds in excess of ninety miles per hour," swerved toward a police cruiser, smashed into the officer's car, and continued to drive on. 954 F.2d at 344, 347. The Sixth Circuit upheld a similar use of deadly force in *Scott.* There, officers used deadly force after the suspect had swerved off the road, narrowly missing a police cruiser, led police on a chase for over twenty minutes at speeds ranging between 85 to 100 miles per hour, and, then, when the suspect lost control, attempted to

run down a police officer. 205 F.3d at 872, 877-78. In *Cole*, the Eighth Circuit upheld the use of deadly force where the suspects, driving an eighteen-wheel tractor-trailer, led police on a 50-mile car chase at speeds over 90 miles per hour, forcing more than one hundred cars off the road and attempting to ram several police cars. 993 F.2d at 1330-31, 1333-34. Finally, in *Pace*, the Eleventh Circuit sustained the use of deadly force after the suspect, already pepper-sprayed by an officer through his car window, led officers on a fifteen-minute high-speed chase during which he made erratic turns, swerved at police cars approaching from the opposite direction, drove through a front yard at high speed, almost hit a motorist head-on, and then accelerated toward a police car trying to block the road. 283 F.3d at 1277-78, 1281-82.

None of the factual scenarios that arose in these high-speed pursuit cases remotely resembles the situation that confronted Brosseau when she shot Haugen. Brosseau shot Haugen at the moment he started his engine. There was no high-speed pursuit and no attempt by Haugen to swerve or ram his car at anyone—or indeed, to take *any* threatening action at all. As the Ninth Circuit also correctly points out, Brosseau never stated that she shot Haugen to prevent a high-speed chase, and so the record below was not developed regarding when it would be appropriate for officers in Puyallup County, Washington to initiate or continue a high-speed chase. 351 F.2d at 387.

Brosseau neglects to point out that the Ninth Circuit's ruling is consistent with several circuit rulings, arising in much more analogous circumstances, that an officer violates the Fourth Amendment when he shoots a suspect in a vehicle without a reasonable, objective basis for believing that the suspect actually poses a threat of serious physical harm. In particular, when the evidence, taken in the light most favorable to the plaintiff, shows that, as here, the suspect did not menace officers or others with his vehicle or that officers were not

positioned so as to be in imminent jeopardy from the vehicle, the courts of appeals have held that the plaintiff's Fourth Amendment claim survived summary judgment. In *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993), for example, the Seventh Circuit denied summary judgment to officers who shot a suspect, suspected of stealing a cab, who was driving the cab toward one of them as he attempted to flee. The court reasoned that the suspect's "escape attempt did not involve menacing a police officer or civilian with a weapon—at least not until [the officer] stepped into the path of a car that had just begun to accelerate quickly." *Id.* at 233. On plaintiff's version of the facts, his attempt to maneuver the cab was not so reckless that "police officers could reasonably fear for their safety or the safety of the community." *Id.* Indeed, the court questioned how fast the cab could be moving, "even with a floored accelerator, from a full stop after less than ten feet," *id.* at 234 n.1—an obvious question here as well, where the red car and pickup truck supposedly endangered by Haugen were only feet away.[5]

Similarly, in *Cowan v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003), the Second Circuit denied summary judgment to an officer who shot and killed the driver of a car the officer feared was driving at him because, on plaintiff's version of events, the officer was not in front of the vehicle, the officer did not wave his hands at the driver, and the vehicle made no sudden turns.

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[5] The Ninth Circuit 1994 decision in *Bray v. County of San Diego*, 1994 WL 65305 (9th Cir. Mar. 2, 1994), was similar. There an officer shot and killed a suspect driving a possibly stolen pickup truck when he began backing up and the deputies were approximately ten feet behind the truck. *Id.* at *1. The court held that the officer's use of deadly force was objectively unreasonable, even assuming that the truck was rapidly backing up, because it was unreasonable for the officer to believe "that they would suffer death or serious physical harm from the backing up of Bray's truck." *Id.* at *3.

Moreover, even if faced with an oncoming vehicle, the court concluded that the proper police response would be to get out of the way rather than shoot. *Id.* at 763; *accord Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999) (denying summary judgment to officer who shot and killed the driver of a car in a mall parking lot, attempting to escape after stealing clothing, where there was a genuine factual dispute regarding how close the officers were, where they were positioned, and whether they were actually in jeopardy from the car backing up).

Even *after* high-speed car chases have occurred—again, not the case here—the courts of appeals have hesitated to find use of deadly force lawful at summary judgment where it was not clear that the suspect had posed a hazard to the officer or others at the time of the shooting. In *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), for example, the same circuit that decided *Pace v. Capobianco, supra*, held that a reasonable jury could find that an officer acted unreasonably in firing at a pickup truck even after a pursuit at 80-85 miles per hour in a 70 mile-per-hour zone, because, on plaintiff's version of events, it was not clear when the officer fired that he had probable cause to believe that he or other officers "were in immediate danger from the suspects," and the record did not reflect "that the suspects had menaced or were likely to menace others on the highway at the time of the shooting." *Id.* at 1330.[6]

So, too, in *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), the circuit that decided *Cole v. Bone, supra*, denied summary judgment to a police officer who shot and killed a

[6] *Accord Waterman v. Batton*, 294 F. Supp. 2d 709, 724-31 (D. Md. 2003) (finding Fourth Amendment violation where police shot and killed a driver stopped after a car chase when, taking the evidence in the light most favorable to plaintiff, a reasonable officer would have perceived that none of the officers was directly in front of the driver's vehicle when he accelerated again and that the driver did not steer his vehicle toward the officers).

suspect after a high-speed car chase that occasionally exceeded speeds of 100 miles per hour. The suspect eventually swerved off the road, sliding down into a ditch. Although the officers claimed that the suspect's truck drove back up the hill at them, forcing them to shoot, other witnesses maintained that the shots began almost immediately after the truck left the road. *Id.* at 777. The Eighth Circuit denied summary judgment because there was a genuine dispute as to what the driver was doing when the officers shot and killed him. *Id.* at 779.

Brosseau also argues that the Ninth Circuit's rejection of her concerns that Haugen may have been attempting to retrieve a weapon when he supposedly dived downward is at odds with *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991); *see* Cert. Pet. 16; *see also* Peace Officers Amicus Br. 9-10 (citing *Reese* and *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001)). In *Reese*, robbery suspects led officers on a car chase, the passenger threw what appeared to be pieces of a stolen cash register out the window, and the driver spun his car out of control. Despite orders from an officer for the occupants to raise their hands after the car had come to a stop, the passenger repeatedly raised and lowered his hands below the officer's sight line. The Fifth Circuit held that the officer could reasonably believe that the suspect had retrieved a gun and was about to shoot. *Reese*, 926 F.2d at 500-01. In *Thompson*, an officer responded to a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery. One suspect led the officer on a foot chase and moved his arms as though reaching for a weapon at waist level. When his arms continued to move after the officer yelled "stop," the officer shot and killed him. The Eighth Circuit likewise held that the use of deadly force was reasonable. 257 F.3d at 898-99.

Here, by contrast, there was no violent prelude to Haugen's alleged gesture of reaching for a weapon, unlike *Reese* and *Thompson*, and no report of a weapon or shots fired, also unlike *Thompson*. In addition, Brosseau shot Haugen at a

time when she admitted that she was under no apprehension that Haugen was threatening her with a weapon or, indeed, that he was doing anything other than starting to drive. Equally important, as noted above, the facts are disputed as to whether Haugen ever dived forward at all—the gesture that allegedly triggered Brosseau's concern. As the court of appeals found, taking the facts in the light most favorable to Haugen, he did not dive forward. *See* 351 F.3d at 383.

The Ninth Circuit's decision is thus consistent with *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002). There, officers shot and killed a suspect because he did not show them his hands and they allegedly feared a weapon. The Eighth Circuit, which decided *Thompson* only the year before, denied the officers summary judgment because of factual disputes about the suspect's stance and what he was actually doing with his hands. *Id.* at 451-54; *accord Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (denying summary judgment to officer who fatally shot passenger of car after a high-speed chase because passenger allegedly reached to the floor, where there was a factual dispute regarding whether officer had cause to believe that the passenger, who turned reflexively away from the breaking window, was reaching for a weapon); *Carter v. City of Chattanooga*, 803 F.2d 217, 225-27 (6th Cir. 1986) (unreasonable for officer to shoot suspect when he was holding something officer thought might be a gun, but which was actually a wash cloth).

This variation in outcomes—even within circuits—among cases involving the deadly use of force to prevent a suspect from escaping in a vehicle or where a suspect is supposedly reaching for an object, is the natural outgrowth of the different circumstances at hand, not proof that the *Garner* test is unclear or that there is a circuit split that calls for resolution by this Court. Review of the cases shows that their different outcomes reflect different facts, not disagreements on the law. Whether the Ninth Circuit correctly applied the test to one of those sets

of "limitless factual circumstances," *Saucier*, 533 U.S. at 205, presents no issue worthy of this Court's review.

II. THE NINTH CIRCUIT'S DECISION FAITHFULLY APPLIED THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS AND CREATES NO SPLIT IN THE CIRCUITS ON WHETHER THE LAW WAS CLEARLY ESTABLISHED THAT THE SHOOTING WAS UNLAWFUL.

Turning to the second step of *Saucier*'s two-step qualified immunity analysis, 533 U.S. at 200-202, the Ninth Circuit analyzed whether Haugen's Fourth Amendment right was "clearly established" such that it was "defined with sufficient specificity that a reasonable officer would have known she was violating it." 351 F.3d at 391. The court of appeals correctly held that it was.

Brosseau argues that the court's holding that the constitutional violation was clearly established is "[t]he most blatantly-incorrect aspect of the Ninth Circuit's opinion," Cert. Pet. 21, without articulating what legal error it believes the court committed. Her argument is based on little more than the fact that there was a dissent from the court of appeals panel's opinion and a dissent from the denial of rehearing en banc. She argues that "[r]easonable mistakes are entitled to immunity," and that "[i]f 'officers of reasonable competence could disagree on th[e] issue, immunity should be recognized.'" Cert. Pet. 21 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Here, Brosseau continues, "Ninth Circuit *judges* could not agree that Brosseau's acts were a violation." *Id.*

This Court has addressed just such an argument in the context of interpreting the meaning of "clearly established [federal] law" for purposes of the standard of review set forth in the federal habeas corpus statute, 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court considered the Fourth Circuit's approach to determining whether a state

court ruling "involved an unreasonable application of [] clearly established Federal law, as determined by the Supreme Court of the United States." The court of appeals had held that a state-court decision involved such an unreasonable application "only if the state court has applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" *Id.* at 409 (O'Connor, J.) (citation omitted). Rejecting this additional overlay, this Court reasoned that "[d]efining an 'unreasonable application' by reference to a 'reasonable jurist,' however, is of little assistance to the courts . . . and, in fact, may be misleading." Instead, the habeas court should ask whether the state court's application of clearly established federal law was "objectively unreasonable" and "should not transform the inquiry into a subject one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did." *Id.* at 409-10. As the Court emphasized in that analogous context, "the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." *Id.* at 410; *cf. Beard v. Banks*, --- S. Ct. ---, slip op. at 9 n.5 (June 24, 2004) ("Because the focus of the inquiry [for purposes of habeas corpus retroactivity analysis] is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new."). That there was a dissent in the court of appeals has no bearing on either whether Brosseau's decision to shoot Haugen was objectively unreasonable or whether Haugen's right not to be shot under the circumstances was clearly established.

Haugen does not quarrel with Brosseau's statement that police officers are entitled to "fair warning" that their actions violate an individual's rights. Cert. Pet. 22 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)). Here, the constitutional test governing the use of deadly force was clearly set out in *Garner*

in 1985 and further addressed in *Graham* in 1989, long before Brosseau shot Haugen. Nor does it matter whether any case law addressed the factual idiosyncracies of the situation confronting Brosseau when she fired—although there was such similar case law. *See* Part I.B., *supra*. *Hope* teaches "that officials can still be on notice that their conduct violates established law even in novel factual circumstances" and that there is no need for previous cases to be "fundamentally similar." 536 U.S. at 741. As this Court explained in *United States v. Lanier*, 520 U.S. 259, 271 (1997): "[A] general constitutional rule already identified in the decision law may apply with obvious clarity to the specific conduct in question . . . ." Under *Garner*, it should have been plain to a reasonable officer in Brosseau's position that Haugen posed no threat of death or serious physical harm to her or anyone else.

Brosseau maintains that other circuits addressing "the same legal issue on similar facts have uniformly applied the [qualified immunity] doctrine to the officer's conduct." Cert. Pet. 22. Again, that contention is baseless. In analogous cases, the court of appeals have denied summary judgment to officers seeking qualified immunity. *See* Part I.B., *supra*.

III. THIS CASE TURNS ON ITS OWN FACTS AND DOES NOT SIGNAL THAT DEADLY FORCE CASES WILL ROUTINELY GO TO TRIAL IN THE NINTH CIRCUIT.

Finally, Brosseau argues that the Ninth Circuit's decision will mean that all § 1983 cases involving the use of deadly force will routinely be sent to trial in that Circuit, defeating the purposes of qualified immunity. Cert. Pet. 4, 13, 24. Her assertion has already been disproved. In several cases handed down in the 11 months since the panel's decision was first announced in August 2003, the Ninth Circuit has already upheld the grant of summary judgment in favor of officers employing deadly force, including in instances in which the

suspect attempted to escape by vehicle. *See, e.g., Dehertoghe v. City of Hemet,* 2003 WL 22854682 (9th Cir. Dec. 2, 2003) (holding use of deadly force not unreasonable); *Smith v. City of San Bernardino,* 2003 WL 22682491 (9th Cir. Nov. 12, 2003) (upholding use of deadly force following high-speed chase); *Mason v. Horan,* 2003 WL 22000316 (9th Cir. Aug. 22, 2003) (upholding finding of qualified immunity in favor of federal agent who shot suspect after he attempted to ram agent with his truck), *cert. denied,* 124 S. Ct. 1724 (2004); *cf. Torres v. Runyon,* 2003 WL 22598339 (9th Cir. Nov. 6, 2003) (holding prison guard entitled to qualified immunity for use of deadly force under the Eighth Amendment to stop a prison riot), *cert. denied,* 124 S. Ct. 2418 (2004). That the same court continues to hand down decisions finding no Fourth Amendment violation or granting qualified immunity only serves to confirm again the fact-bound nature of these kinds of cases.

Brosseau and her amici conjure up images of Brosseau acting in the heat of the moment to stop a "desperate and combative felon," Cert. Pet. 2, who was "visibly disturbed," States Amici Br. 14 (quoting 351 F.3d at 395 (Gould, J., dissenting)), and in "unstable frame of mind." Peace Officers Amicus Br. 4. These inflammatory characterizations of Haugen and his actions find no support in the record—unless, of course, any suspect who seeks to avoid arrest is necessarily deranged because the officer could shoot to kill. Officer Brosseau shot an unarmed man in the back as he attempted to drive away from her. In these circumstances, the officer's actions *should* be second-guessed. *See Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982) ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate . . . .").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Bonnie I. Robin-Vergeer
Counsel of Record
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Randy W. Loun
Law Office of Randy W. Loun
509 4th Street, Suite 6
Bremerton, WA 98337
(360) 377-7678

Counsel for Respondent

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In The

Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

MARY ANN MCCONAUGHY
Counsel for Petitioner
KEATING, BUCKLIN & MCCORMACK
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861

July 2004

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PETITIONER'S REPLY BRIEF

Respondent makes three major arguments opposing this petition: Haugen claims this case is a "fact-bound ruling" which does not present a new "analytical or other important legal question to resolve." *Opposition brief,* 1. Respondent claims this case is consistent with qualified immunity rulings of this Court, and factually-similar cases from other circuits. Finally, he insists the decision has no implications for future Fourth Amendment jurisprudence in the Ninth Circuit.

This case presents an opportunity for this Court to address divergent approaches to facts in the two-step qualified immunity test in Fourth Amendment civil rights cases. The opinions below reveal the need for clarification of the appropriate perspective for assessing the objective reasonableness standard of the first step, and guidance for the degree of factual specificity necessary for the second step's focus on whether the law is "clearly established." These issues deal with facts certainly, but have significance for a wide array of civil rights cases – well beyond the result in this case. The sharply contrasting views of the majority opinion and the dissenting judge joined by five judges dissenting from denial of *en banc* rehearing, demonstrates the polarization of views on the issues and the need for further guidance from this Court.

1. The Ninth Circuit Majority's Analytical Approach Effectively Eliminates the Qualified Immunity Defense Unless All Witnesses Are Unanimous.

Although the Ninth Circuit was careful to repeat the two-part legal standard articulated in *Saucier v. Katz,* 533 U.S. 194 (2001), its lengthy analysis of this case drawing

in all manner of observations from multiple perspectives before, during, and after the shooting amply demonstrates the analytic error. The majority bases its incorrect approach citing a statement in *Siegert v. Gilley,* 500 U.S. 226, 232 (1991) that the first step objective reasonableness determination contemplates that facts should be "[t]aken in a light most favorable to the injured party." *See also, Saucier v. Katz,* 533 U.S. at 201. The appellate court relied upon this phrase to justify a wholesale rejection of important objectives that have always been the underpinnings of qualified immunity in use of force cases: protecting officers from civil rights liability for reasonable decision-making, even mistakes, in the rapidly-evolving and dangerous split seconds when a decision to use deadly force is made. Courts should not be permitted to insulate cases from review by simply parroting this Court's rule while applying a wholly inconsistent analysis to factual circumstances that negate important principles in Supreme Court precedent.

The analytic approach of the Ninth Circuit effectively neutralizes this Court's repeated statements that facts should be viewed from the officer's on-scene perspective. Nominally viewing the facts in a manner favorably to respondent, resulted in the wholesale rejection of the officer's knowledge, beliefs and information relying instead upon facts only available to other witnesses or known only in hindsight. This approach completely undermines the intended purpose of affording immunity from suit in early stages of litigation, immunity that is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

For example, the majority gave weight to Haugen's claims that he was not violent when the only information

known to the officer at the critical time was that he was fighting. Other justifications included information that bystanders could see that petitioner Brosseau's fellow officers were not in harm's way as she feared; bystanders did not see Haugen reaching for a weapon as he attempted to drive away although their vantage point was much more distant and obscured than hers; observers variously believed the shot was fired just before, just after, or during the time the car was starting up, etc. Perhaps most troubling, the majority accepted at face value respondent's claim that he had a "clear path" to safely exit the area directly contradicting the officer's belief that bystanders and fellow officers were at risk.

The opinion requires a jury trial when various witnesses cannot agree on the split-second timing of a shot or when respondent's conclusory assessment of the safety of his driving disagrees with the officer's perception.[1]

The Ninth Circuit's opinion has grafted this Court's analytic framework with an unrealistic and unworkable approach to the first step in the qualified immunity analysis requiring unanimity of observation and opinion to eliminate a jury trial. If objective reasonableness becomes a jury question whenever witnesses and parties are not in complete agreement, the likelihood of qualified immunity shielding all but "plainly incompetent" officers is remote. *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

---

[1] The majority concludes that Haugen's assessment that he had "and easy escape" by driving around parked vehicles in his path trumps the officer's stated concern that respondent's reckless driving would endanger persons in the immediate vicinity despite photographs which afford objective evidence of the scene. App. 30-31.

Viewing disputed facts "in a light most favorable to the party asserting the injury" cannot be stretched this far. Few cases could ever be expected to meet this standard, and it would not serve the stated purpose of immunizing reasonable mistakes from civil liability. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Rather, the "essential" and "material" facts known to the officer and viewed from the officer's on-scene perspective that are the appropriate considerations. The essential, material facts in this case *are not disputed*.[2] Among them are the following: (1) respondent Haugen was known by the officer to have felony no-bail warrants; (2) Haugen knew Brosseau was an officer; (3) Haugen was actively eluding lawful arrest when he fled to his car and drove away; (4) before shooting, Officer Brosseau made other less drastic efforts to arrest Haugen and eliminate the threat of his reckless escape, including verbal commands that he open the car door, pointing her weapon implying an intent to use deadly force, breaking the car window and struggling with Haugen over the keys as he tried to start the car;[3] (5) Haugen's vehicular flight occurred in close proximity to two parked vehicles containing four persons, including a young child with the closest vehicle only four feet from his car (described by Haugen as a "tight, small

[2] As a dissenting judge stated: "[T]he majority states that I do not view the facts in the light most favorable to Haugen. But I relied only on facts Haugen does not dispute, facts that compel the conclusion that Haugen's fleeing in his vehicle would have posed a significant threat of death or serious physical injury to others." App. 65.

[3] Even the majority is forced to acknowledge: "At the time Brosseau shot Haugen, it was clear that he intended to flee in his Jeep and that a number of non-lethal measures had failed to prevent him from doing so." App. 32.

space"); (6) the physical layout of the scene was depicted in photographs demonstrating that the officer's position made it impossible for her to know whether other officers previously advised of her position, without warning, would run in front of the Haugen vehicle as it pulled away.

It is true the officer subjectively harbored concerns that Haugen was attempting to retrieve a weapon because she saw him lean down immediately before she shot, but this was not the only reason for her decision. Other witnesses did not see this movement, but the officer was situated much closer to him than they were. He was partially concealed from their view in the car, and the windows were darkened by tinting film and partially covered with newspaper.

Does the failure or inability of distant witnesses to observe negate the officer's perceptions of events only a few feet away? The Ninth Circuit analysis requires that the facts meet such a standard. This Court has not addressed how factual discrepancies or differing opinions can be resolved in a manner that appropriately furthers the purposes of the qualified immunity doctrine.

Respondent claims the Ninth Circuit's opinion is "fact-bound" and "fact specific," implying that this extremely controversial ruling is an anomaly. There is nothing to suggest that this set of facts is any less or more complex than other all-too-common police shooting incidents. Similarly-detailed cases with varying witness accounts will certainly continue to arise.

2. The Ninth Circuit's Treatment of This Case Demonstrates a Clear Split Among the Circuits Concerning Determination of Qualified Immunity in Cases Involving Potential Reckless Vehicular Escape.

Respondent insists this case can be reconciled with the decisions of other circuits addressing use of deadly force to protect against vehicular assault. Respondent is wrong. He claims that the facts of this case "do not remotely resemble" the fact scenarios in cases cited from other circuits claiming that in this case "[t]here was no [prior] high-speed pursuit and no attempt by Haugen to swerve or ram his car at anyone – or indeed, to take any threatening action at all." *Opposition brief,* 16. Officer Brosseau thought there was a grave threat, as did the dissenting judges. Respondent claims that officers must stand by until the potential danger comes to fruition. Respondent and the majority's attempt to distinguish other cases improperly focuses the inquiry on past events rather than the immediate and legitimate concern: the officer's perception of the need to protect herself or others from immediate danger.

Respondent's reliance on suspects' prior reckless driving in other cases neglects to point out that many of the shooting decisions were made when the suspects' cars were stopped and the officers were on foot nearby like Officer Brosseau in this case. *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Smith v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) and *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000). None of the cases from other circuits requires the omniscient perspective of the scene or after-the-fact considerations about whether the suspect would

have escaped without ramming other motorists or parked cars.

Other cases cited by respondent fail to present the array of *undisputed* facts available in this case, or are not sufficiently similar to this case. The *amici* States have argued that this case presents an opportunity for this Court to clarify the factual specificity necessary for determining whether the law is "clearly established." *Amici Brief of the States*, 17-19. The Fourth Amendment necessarily entails a balancing test of the suspect's right to be free from excessive force and the officer's duty to apprehend suspects and protect the public. This balancing must "accommodate limitless factual circumstances." *Saucier v. Katz*, 533 U.S. 194, 204. The Graham "objective reasonableness" standard does not provide an answer to whether a "particular application of force will be deemed excessive" under the Fourth Amendment. *Id.* at 205. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 202. Other closely analogous factual precedents available to the Ninth Circuit reached a different conclusion about the objective reasonableness of officer action and the application of qualified immunity.

Cases cited in respondent's brief which have held issues of fact need jury resolution did not present the array of undisputed facts that characterize this case or involved substantially dissimilar fact patterns. Some of these cases include examples of viewing facts from a perspective other than the officer's – erroneously, petitioner would submit. *Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) (pre-*Saucier* case holding that a police officer's decision to step in front of a suspect's fleeing vehicle created the threat of serious physical harm used to justify

deadly force); *Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003) (non-suspect passenger with no known dangerous propensities shot while driving vehicle toward officer after suspect fled the scene); *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001) (suspect in field shot by two officers who gave conflicting versions of facts, incident not related to vehicular flight); *McCaslan v. Wilkins*, 183 F.3d 775 (8th Cir. 1999) (witnesses disputed officer's claims that shots were fired while vehicle moving toward them); *Hernandez v. Miami*, 302 F.Supp.2d 1373 (S.D.Fla. 2004) (suspect shot running away from officer after having removed a gun from his waistband, dropping it at scene).

3. The Majority's Incorrect Analysis Will Result in More Cases Being Sent to Juries.

Respondent urges that because *some* Ninth Circuit cases have applied qualified immunity since this decision, attempting to refute petitioner's arguments that many other appropriate cases will mistakenly be sent to trial. It was *this Court's* stated concern in two earlier Ninth Circuit cases that the refusal to properly apply qualified immunity results in unnecessary jury trials with the attendant diversion of official attention and resources. *Saucier v. Katz,* 533 U.S. at 201 (two-step qualified immunity analysis "serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."); *Hunter v. Bryant,* 502 U.S. 224, 228 (1991). ("Immunity ordinarily should be decided by the court long before trial.")

Respondent repeats the majority opinion's characterization of Haugen as an unarmed man "shot in the back as he attempted to drive away [from the officer]" (*see* App. 13; *Opposition Brief*, 24). The description reveals the utter

refusal to consider events from the officer's perspective, namely her stated concern for *others in front of Haugen's vehicle and in his path*. This misleading description of events simply underscores the fundamental error below. It is true that other panels have upheld qualified immunity decisions in the Ninth Circuit, as perhaps the six judges dissenting from hearing *en banc* in this case would have, given their observation that the "majority goes to great lengths to explain – with the benefit of hindsight – the small ways in which Officer Brosseau's perceptions were inaccurate" rather than looking at facts "as Brosseau reasonably perceived them." App. 2. This decision is wrong, and it clearly has significant implications for any officer considering the use of deadly force to protect against the consequences of a suspect's reckless vehicular escape.

CONCLUSION

The majority opinion in this case conflicts with fundamental principles this Court has set out for addressing the appropriate balance of individual liberties and public safety in § 1983 use of force cases. For the stated reasons, petitioner Brosseau urges this Court to accept review of this case.

Respectfully submitted this 27th day of July, 2004.

MARY ANN MCCONAUGHY
KEATING, BUCKLIN &
MCCORMACK, INC., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
206/623-8861

Attorney for Petitioner Brosseau

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In The
Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF POLICE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND AND OTHER GROUPS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL JOHN HANSEN
GARRETTSON, GOLDBERG, FENRICH & MAKLER, P.C.
5530 SW Kelly Avenue
Portland, OR 97239
503-226-3906

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION

The Police Officers Research Association of California Legal Defense Fund (Fund) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Joining in this request are the following member affiliates of the Fund: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations, and Wyoming Highway Patrol Association. Also joining in this request are the following non-member groups: National Association of Police Organizations, and Washington Council of Police and Sheriffs. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Fund arises from the fact that the circumstances giving rise to the use of deadly force by Officer Brosseau in this case are familiar to peace officers served by the Fund, which is an organization providing prepaid group legal services to peace officers for matters related to their employment. The Fund, its affiliates, and the other groups serve peace officers throughout the western United States including the states of Colorado, Montana, Wyoming, Nevada, Utah, California, Oregon and Washington. Clear and consistent federal case law is necessary to give practical guidance to peace officers and their employers on the use of deadly force in similar circumstances. Not only is such guidance necessary for the proper working of the qualified immunity defense, but

such guidance serves to protect the safety of peace officers and the community, and to protect the interests of peace officers in fair and just employment-related discipline and potential criminal liability.

In the instant case the Ninth Circuit Court of Appeals has rendered a decision that de-emphasizes the perspective of the peace officer who must make the split-second decision whether to employ deadly force. This perspective includes the potential of a vehicle as a deadly weapon, and the risk of delay in the timing of the peace officer's decision in a dangerous and uncontrolled situation where the threat of a weapon, such as a gun, may be present as well.

Peace officers are tasked with protecting the security of the community and preventing harm. Peace officers need to know when the threat of harm is sufficiently severe and imminent to warrant the use of deadly force and how to make that assessment in the field from the perspective of the peace officer. It is believed that the brief *amicus curiae* is requesting permission to file will provide this perspective and demonstrate the need for review of this case to ensure federal case law gives the practical guidance and fair warning peace officers need to do their jobs lawfully. The analysis employed by the Ninth Circuit in the *Haugen* case creates a split in opinion among the circuits concerning the proper use of deadly force for peace officers in similar circumstances, and thereby subjects

peace officers to trial due to the denial or uncertainty of the defense of qualified immunity.

Respectfully submitted,

MICHAEL J. HANSEN
Counsel of Record
GARRETTSON, GOLDBERG, FENRICH
& MAKLER, P.C.
5530 SW Kelly Avenue
Portland, OR 97239
503-226-3906

Attorneys for Amicus Curiae

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STATEMENT OF INTEREST

Amicus Curiae represents the Police Officers Research Association of California Legal Defense Fund (Fund), its member affiliates: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations, and Wyoming Highway Patrol Association, and the following non-member groups: National Association of Police Organizations, and Washington Council of Police and Sheriffs. The Fund is an organization providing prepaid group legal services to peace officers and public safety employees for matters related to their employment.[1] The Fund provides services to peace officers and public safety employees throughout the western United States including the states of Colorado, Montana, Wyoming, Nevada, Utah, Washington, Oregon and California. The Fund employs a panel of attorneys, such as Garrettson, Goldberg, Fenrich & Makler, P.C., which represents over 90 law enforcement unions throughout the states of Oregon and Washington.

Petitioner, Rochelle Brosseau, has consented to filing this brief. Respondent, Kenneth J. Haugen, has not consented to filing this brief.

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[1] Counsel for a party did not author any part of this brief. The PORAC Legal Defense Fund made the entire and sole monetary contribution to preparation and submission of this brief.

The Fund supports the Petition for Writ of Certiorari. The decision in *Haugen v. Brosseau*, 339 F.3d 859 (9th Cir. 2003) raises uncertainty concerning the use of deadly force that adversely affects the personal liability and employment relations of the members of the Fund.

SUMMARY OF ARGUMENT

Peace Officers have a strong interest in clear and consistent case law on the lawful use of deadly force in circumstances similar to those faced by Officer Brosseau in the *Haugen* decision of the Ninth Circuit. In particular, it is not uncommon for peace officers to face circumstances where an apparently dangerous and desperate suspect seeks to flee in a vehicle or appears to be reaching for a weapon. Peace officers must be able to assess the situation immediately to determine if the use of deadly force is justified. The Ninth Circuit decision in *Haugen* creates a split among the circuit courts, and denies peace officers fair warning of whether deadly force may be lawfully used in similar circumstances.

ARGUMENT

1. Peace Officers Have a Strong Interest in Clear and Consistent Case Law On the Use of Deadly Force.

Peace officers have a strong interest in clear and consistent case law that gives practical guidance and fair warning on the proper use of deadly force. The goal of law enforcement is the security of the community and the prevention of harm to the community. A peace officer must

be able to anticipate what a suspect will do in dangerous and uncontrolled circumstances, and be ready to take appropriate, legal action. The issue of personal safety and the safety of others is at stake. Personal civil liability is at issue. Potential employment-related discipline, criminal charges, and adverse actions affecting job assignments and career development are at stake. A strong community interest is at stake. Public anger and questions may continue unabated. Employers may respond to public frustration through some form of discipline or reassignment as a compromise unlikely to satisfy the legitimate concerns of anyone.[2]

2. A Peace Officer Must Be Able to Assess a Dangerous Situation Involving the Use of Deadly Force Immediately.

Officer Brosseau's assessment of dangerousness included circumstances often confronted by peace officers when making split-second decisions in the milieu of an ongoing chase of a suspect in dangerous circumstances. Haugen's history of drug abuse included frequent use of methamphetamine. Methamphetamine is widespread in the Western United States. Statistical reports on the number of meth labs can be found at www.usdoj.gov/dea/statisticsp.html. Meth users tend to violent and unpredictable behavior. A National Institute of Drug Abuse report states:

> "Long-term methamphetamine abuse results in many damaging effects, including addiction.

[2] *See* The Oregonian Newspaper, *Cops: Desperate for Witness Protection* by Steve Duin, dated February 19, 2004.

> Addiction is a chronic, relapsing disease, characterized by compulsive drug-seeking and drug use which is accompanied by functional and molecular changes in the brain. In addition to being addicted to methamphetamine, chronic methamphetamine abusers exhibit symptoms that can include violent behavior, anxiety, confusion, and insomnia. They also can display a number of psychotic features, including paranoia, auditory hallucinations, mood disturbances, and delusions (for example, the sensation of insects creeping on the skin, which is called "formication"). The paranoia can result in homicidal as well as suicidal thoughts."[3]

Even though Haugen did not have a history of criminal convictions for crimes involving the infliction or threatened infliction of serious physical harm, his propensity for violent behavior existed.

Haugen's behavior was consistent with his history of methamphetamine use. Officer Brosseau had reason to conclude that Haugen was in an unstable frame of mind, and had no regard for his own life. *Haugen v. Brosseau, supra*, 339 F.3d at 865. It is reasonable to assume that Haugen had little regard for the life or safety of anyone else who might be in his way. Haugen was avoiding the police because of a felony no-bail warrant for drugs and other offenses. Haugen had a falling out with his partners in selling drugs and fixing cars. It was a 9-1-1 call about a fight between Haugen and his partners that brought

[3] *See* Research Report Series, *Methamphetamine Abuse and Addiction*, NIDA, U.S. Department of Health and Human Services, at www.nida.gov/Research Reports/methamph/methamph3.html, last update May 21, 2003.

Officer Brosseau to the scene. Haugen fled from Officer Brosseau and his partners on foot. He was free for over half an hour in a residential neighborhood. Officer Brosseau spotted Haugen running to his Jeep and gave chase. She caught up to him at the Jeep. They struggled for control of the Jeep. Officer Brosseau had her weapon drawn. She had ordered Haugen to stop. She broke the passenger window with her weapon. She struck Haugen on the side of his head with her weapon. She struggled with Haugen over possession of the keys. Haugen ignored and resisted all these attempts to stop and arrest him. Haugen had reached for the floorboard of his Jeep several times during this struggle, causing Officer Brosseau to fear that he might be reaching for a weapon. *Id.*, 339 F.3d at 864. Haugen gained control of his Jeep. He started the engine, and he was about to pull away. Haugen faced the Honda Civic directly in front of him containing his girlfriend and her young daughter. The driveway was further blocked at the end by a pick-up truck containing two adult males, Haugen's erstwhile partners. Officer Brosseau was standing next to the Jeep and behind Haugen. There were officers on foot in the area. *Id.*, 339 F.3d at 861. Officer Brosseau could not know in which direction Haugen might drive his vehicle and what his intent was. Haugen was not controlled or contained.

At this moment Officer Brosseau stepped back and fired one shot to stop Mr. Haugen from fleeing in his vehicle. The issue was not the flight. The issue was the reckless use of a vehicle in circumstances, which are capable of causing death or serious bodily injury. *Id.*, 339 F.3d at 878 (Guild, J., dissenting). In these circumstances, a vehicle may be a dangerous weapon. Rev. C. Wash.

9A.04.110(6)[4] and *State v. Hill*, 298 Or. 270, 692 P.2d 100 (1984).

Peace officers in circumstances similar to those faced by Officer Brosseau must be able to assess the situation immediately and determine whether the use of deadly force is justified. Peace officers do not have the luxury of lengthy deliberation. Peace officers, just as Officer Brosseau, must act quickly where the suspect is not in control and the peace officers are engaged in active pursuit and attempted arrest of an apparently desperate and dangerous suspect.

3. The Ninth Circuit's Decision Creates a Split Among the Circuits That Denies Fair Warning to Peace Officers.

The Ninth Circuit acknowledged Haugen's own statements that he "stood on the gas" to drive away and that he was in a "small, tight space," and the court acknowledged Officer's Brosseau belief that Haugen was likely to hit the Honda or the pick-up truck in his attempt to flee in his Jeep. *Haugen v. Brosseau, supra,* 339 F.3d at 861, 868. However, the court ignored Haugen's guilty plea to a felony eluding charge, which necessarily included an admission that he was driving in wanton and willful disregard of the lives and property of others. *Id.*, 339 F.3d at 878 (Guild, J., dissenting). This admission supports

[4] Rev. C. Wash. 9A.04.110(6) defines a "deadly weapon" to include a vehicle "which, under the circumstances in which it is used, or threatened to be used, is readily capable of causing death or substantial injury . . ."

Officer Brosseau's observation of Haugen's unstable frame of mind. Rather, the Ninth Circuit determined that any fear Officer Brosseau may have had for the safety of other persons in the immediate area was not supported by the facts. The court accepted Haugen's statement ". . . that he had an easy escape by driving off to the left around the Honda and pick-up." *Haugen v. Brosseau, supra,* 339 F.3d at 868.

The Ninth Circuit also found that the mere possession or display of a weapon was insufficient by itself to justify the use of deadly force. Therefore, the court said, suspicious movements alone would not justify the use of deadly force. *Id.,* 339 F.3d at 863, 865.

In considering the claim of qualified immunity, the court viewed the evidence "in the light most favorable to Haugen." *Id.*, 339 F.3d at 874. In effect, the court did not judge the use of force from the perspective of Officer Brosseau. Rather, the court judged the use of force from the perspective of Haugen.

This analysis diverges from the analyses of other circuits in cases involving similar circumstances. Other circuits have indicated that the use of deadly force is justified when the actions of a suspect gives an officer reasons to fear imminent injury from a weapon, whether the weapon be a gun or a vehicle.

The following cases involve similar circumstances where a vehicle was used in an attempt to escape: *Pace v. Capobianco,* 283 F.3d 1275 (11th Cir. 2002); *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000); *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); and *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991). All of these cases involved a high-speed vehicle chase. The shooting occurred after the suspect

vehicle was stopped and apparently blocked. The suspects remained in the vehicle with the engine running in all these cases. The officers involved in the shooting in the *Scott* and *Smith* cases were not standing in front of the vehicle. Three of these cases, *Pace*, *Scott*, and *Smith*, were precipitated as traffic stops. *Reese* involved pursuit of a man who was in the general vicinity of a reported robbery, and who fit the general description of a suspect in the robbery. None of the cases stated that the suspects had a prior history of serious violent crimes. In three of the cases, *Pace*, *Scott*, and *Smith*, the suspects ignored warnings from the officers to stop, and the officers fired one or more shots to prevent the suspects from fleeing. The prior high-speed chases and the manner in which the suspects drove indicated desperation to escape and dangerousness.

In *Haugen*, desperation to escape and dangerousness were indicated by the outstanding no-bail felony warrant, a history of methamphetamine use, flight on foot, active physical resistance to arrest, ignoring commands to stop given by an armed officer, and an attempt to flee in a vehicle while blocked by passenger vehicles containing civilians directly in front of the suspect's vehicle.

In *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992), the court noted that a vehicle can be a deadly weapon and that the suspect posed a danger, and in a statement that could be applied easily to Officer Brosseau's situation said:

> "After a dramatic chase, Officer Shulz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Shulz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably."

The following cases involve similar circumstances where a peace officer feared that the suspect was armed: *Thompson v. Hubbard,* 257 F.3d 896 (8th Cir. 2001); and *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991). In both cases, the suspects made movements as if reaching for a weapon. In both cases, no weapon was found. In both cases, the suspects did not attack or show other aggression towards the officer or other persons. In both cases, dangerousness of the suspects was supported by pursuit of the suspects as persons that may have been involved in armed robberies. However, in both cases, the suspects were spotted by police in the general area of the robberies and only fit the general descriptions of the suspects. As noted above, other factors indicated desperation and dangerousness in the *Haugen* case.

In the *Reese* case the police approached a vehicle after a convenience store robbery. The court found that one suspect's actions of reaching with his right hand to the floorboard several times after being ordered to raise his hands could cause a reasonable officer to fear imminent and serious physical injury. The fact that there was no gun did not change the situation because the officer could not know that. *Id.*, 926 F.2d at 501.

In the *Thompson* case the court held:

> "An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun. *See, Ryder v. City of Topeka*, 814 F.2d 1412, n. 16 (10th Cir. 1987) (concluding that, because a requirement that a suspect actually have a weapon would place police in "a dangerous and unreasonable situation . . . whether a

particular seizure is reasonable is dependent on the 'totality of the circumstances,' and not simply on whether the suspect was actually armed.")."

Thompson v. Hubbard, supra, 257 F.3d at 899 (where an officer stopped a vehicle containing a person fitting the description of a suspect involved in an armed robbery, and the person had fled on foot, jumped a short fence, had his back turned to the officer, and had reached at his waist level as though reaching for a weapon.).

The above issues demonstrate there is now a split in the circuits whether qualified immunity should be granted to a peace officer in circumstances similar to those faced by Officer Brosseau, considering what she reasonably knew of the facts at the time of the shooting and the notice she had from existing law at the time. Any reasonable peace officer considering the precedents concerning an apparently desperate and dangerous suspect seeking to flee in a vehicle or reach for a weapon would have concluded that the use of deadly force was justified. A peace officer in similar circumstances should be entitled to qualified immunity. As this court said in *Saucier v. Katz,* 533 U.S. 194, 202 (2001), "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law.")."

This court should not let the split in opinion among the circuit courts continue. To do so would be to deny peace officers fair warning whether deadly force may be justified in circumstances similar to those faced by Officer

Brosseau. As the cases cited in this brief indicate, these circumstances are not uncommon to law enforcement.

CONCLUSION

For the reasons stated herein, the PORAC Legal Defense Fund and its affiliates respectfully request that the Petition for Writ of Certiorari be granted to ensure that the standards for the proper use of deadly force in similar circumstances are clearly established.

Respectfully submitted,

MICHAEL J. HANSEN
Counsel of Record
GARRETTSON, GOLDBERG, FENRICH
& MAKLER, P.C.
5530 SW Kelly Avenue
Portland, OR 97239
503-226-3906

Attorneys for Amicus Curiae

(3)

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NO. 03-1261

IN THE SUPREME COURT OF THE UNITED STATES

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, DELAWARE, HAWAII, MARYLAND, MICHIGAN, NEBRASKA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS AND WYOMING IN SUPPORT OF PETITIONER

CHRISTINE O. GREGOIRE
Attorney General

Talis Abolins*
Catherine Hendricks
Assistant Attorneys General

629 Woodland Square Lp. SE
P. O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600
**Counsel of Record*

ALABAMA

Troy King
Attorney General
State of Alabama
Office of the
Attorney General
11 South Union Street
Montgomery, AL 36130

Phone: 334/ 242-7300

ALASKA

Gregg D. Renkes
Attorney General
State of Alaska
Office of the
Attorney General
P.O. Box 110300
Juneau, AK 99811-0300
Phone: 907/ 465-3600

ARIZONA

Terry Goddard
Attorney General
State of Arizona
Office of the
Attorney General
1275 W. Washington St.
Phoenix, AZ 85007-2926
Phone: 602/ 542-4266

DELAWARE

M. Jane Brady
Attorney General
State of Delaware
Office of the
Attorney General
820 N. French Street
Wilmington, DE 19801
Phone: 302/ 577-8400

HAWAII

Mark J. Bennett
Attorney General
State of Hawaii
Office of the
Attorney General
425 Queen Street
Honolulu, HI 96813
Phone: 808/ 586-1282

MARYLAND

J. Joseph Curran, Jr.
Attorney General
State of Maryland
Office of the
Attorney General
200 Saint Paul Place
Baltimore, MD 21202
Phone: 410/ 576-6300

MICHIGAN

Michael A. Cox
Attorney General
State of Michigan
Office of the
Attorney General
P.O. Box 30212
525 W. Ottawa Street
Lansing, MI 48909-0212

Phone: 517/ 373-1110

NEBRASKA

Jon Bruning
Attorney General
State of Nebraska
Office of the
Attorney General
P.O. Box 98920
Lincoln, NE 68509-8920

Phone: 402/ 471-2682

OHIO

Jim Petro
Attorney General
State of Ohio
Office of the
Attorney General
30 E. Broad St., 17th Flr.
Columbus, OH 43215

Phone: 614/ 466-4320

OKLAHOMA

W.A. Drew Edmondson
Attorney General
State of Oklahoma
Office of the
Attorney General
2300 N. Lincoln Blvd.,
Oklahoma City, OK
73105

Phone: 405/ 521-3921

OREGON

Hardy Myers
Attorney General
State of Oregon
Office of the
Attorney General
1162 Court St. N.E.
Salem, OR 97301
Phone: 503/ 378-6002

SOUTH CAROLINA

Henry McMaster
Attorney General
State of South Carolina
Office of the
Attorney General
P.O. Box 11549
Columbia, SC 29211
Phone: 803/ 734-3970

SOUTH DAKOTA

Lawrence E. Long
Attorney General
State of South Dakota
Office of the
Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070

Phone: 605/ 733-3215

TEXAS

Greg Abbott
Attorney General
State of Texas
Office of the
Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Phone: 703/ 868-9068

WYOMING

Patrick J. Crank
Attorney General
State of Wyoming
Office of the
Attorney General
123 State Capitol Bldg.
Cheyenne, WY 82002

Phone: 307/ 777-7841

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INTEREST OF THE AMICI CURIAE

This brief is filed pursuant to Supreme Court Rule 37.5, on behalf of the State of Washington and the other signature states (the Amici States) through their attorneys general, in support of the Petitioner Rochelle Brosseau, who is a police officer for the City of Puyallup. The Amici States have a paramount interest in preserving police officers' ability to make difficult split-second decisions to protect the public from an imminent threat of serious bodily injury and death, without fear of the expanded exposure to civil rights liability created by the Ninth Circuit.

The Ninth Circuit's decision undermines public safety by holding that Officer Brosseau could not lawfully use her weapon to protect the public from the escalating and inherently dangerous situation created by Respondent Kenneth Haugen and his vehicle. The need for review is all the more compelling given the Ninth Circuit's determination that Officer Brosseau is not even entitled to qualified immunity. Officer Brosseau exercised her discretion in a manner reasonably perceived as necessary to protect the citizens of her community from a suspect who obviously had no regard for his own life, or the lives of others. This is precisely the type of discretionary scenario for which state officers are entitled to qualified immunity.

ARGUMENT

The Petitioner has already addressed the conflict among the circuits presented by the Ninth Circuit's decision. The Amici States agree, and will not repeat the Petitioner's argument. Instead, the Amici States will explain why this Court's review is also warranted by: (1) the Ninth Circuit's substantial departure from this Court's standard for evaluating reasonable force under the Fourth Amendment; and (2) the need to clarify what constitutes clearly established law for police officers confronted with the difficult split-second decision of whether to use deadly force to stop a fleeing felon.

A. The Ninth Circuit's Decision Misapplies This Court's Standard Allowing Police To Use Deadly Force When Reasonably Necessary To Protect The Public

The Ninth Circuit's decision misapplied this Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), which announced the standard for determining whether a "seizure" through the use of deadly force is reasonable under the Fourth Amendment. In evaluating claims of "unreasonable seizure" due to excessive force, this Court has emphasized the need to carefully balance the interests of the individual suspect against the countervailing interests of society. *See id.* at 8 (this balancing of competing interests is "the key principle of the Fourth Amendment") (citations omitted).

With respect to deadly force, this Court has determined that society's interests outweigh the interest of the individual when an officer reasonably believes there is probable cause that the suspect presents a significant risk of serious bodily injury to

the officer, or to others. *Id.* at 11. When this threshold probable cause standard is met, the officer's use of force is "objectively reasonable", and not excessive for purposes of the Fourth Amendment. *See Graham v. Conner*, 490 U.S. 386, 397 (1989).

The evaluation of objective reasonableness under the Fourth Amendment must be undertaken not from the perspective of 20/20 hindsight possessed by a judge in chambers, but from the "on scene perspective" of the officer who must make a split-second decision based on the limited facts and circumstances of the tense, uncertain, dangerous, and rapidly-evolving scenario with which she is confronted.[1] *Graham*, 490 U.S. at 396-97 (1989); *see Saucier v. Katz*, 533 U.S. 194, 205 (2001).

In *Saucier*, this Court reiterated the importance of the officer's "on scene perspective" and also emphasized that the officer's split-second judgment must be evaluated from the officer's "temporal perspective" of "reasonableness at the moment". *Saucier*, 533 U.S. at 206. This is a fact-dependent inquiry from the perspective of the reasonable officer on the scene and at the moment, rather than the 20/20 vision of hindsight after all the facts are gathered.

In this case the Ninth Circuit's analysis unavoidably collides with this Court's standard for

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[1] This Court requires "careful attention to the facts and circumstances of each particular case", including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Saucier*, 533 U.S. at 205 (citation omitted).

evaluating objective reasonableness under the Fourth Amendment. The Ninth Circuit's standard dramatically increases the exposure of law enforcement officers to civil rights claims by: (1) abandoning the proper "on scene perspective", and imputing the officer with knowledge of all facts viewed from all perspectives; and (2) abandoning the proper "temporal perspective", and imputing the officer with after-acquired knowledge not known at the moment of decision.

1. The Ninth Circuit Replaced The "On Scene Perspective" Of The Officer, With A "Combined Perspective" Of All Persons At The Scene

The Ninth Circuit's decision runs afoul of this Court's admonition in *Garner* and *Graham* that the reasonableness of an officer's actions must be evaluated from the standpoint of the officer's "on scene perspective" – considering the facts and circumstances known to the officer at the moment of decision. The Ninth Circuit disregarded the focus of this inquiry, and instead imputed Officer Brosseau with the knowledge of other persons on the scene, even though there was no evidence that she was aware of those facts.

Applying this erroneous "total scene perspective", the Ninth Circuit improperly judged Brosseau from a standard of omniscience, faulting her for failing to act in light of many facts of which she was not aware. For example, the Ninth Circuit faults Brosseau and finds her actions unreasonable because she did not know that: (1) from the perspective of a bystander, the other responding officers who could be struck by Haugen's fleeing vehicle were actually in another yard and not in

harm's way (Pet. App. 31)[2]; (2) from the perspective of bystanders, Haugen was not a dangerously violent aggressor in the altercation for which Brosseau had been summoned (Pet. App. 39)[3]; and (3) from the perspective of Haugen in the Cherokee (and of bystanders in other locations), Haugen did not appear to be reaching for a weapon under the seat (Pet. App. 24).

The Ninth Circuit's "total scene perspective" is illogical and troubling, as it imposes liability based on facts and circumstances not within the officer's knowledge. The relevant perspective is the "on scene perspective" of the officer only – not the combined perspectives and knowledge of every witness and suspect on the scene. Nor is the proper perspective the *Matrix*-like perspective of a judge in chambers, who has the luxury of mentally examining the out-of-control split-second event in slow motion from the combined perspectives of surrounding bystanders. Such a perspective works an injustice to the officer, and to the society she is obligated to protect. Such a perspective also conflicts with the "on scene perspective" mandated by this Court.

2. The Ninth Circuit Replaced The "Temporal Perspective" Of Reasonableness At The Moment" With One

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[2] "Atwood, who witnessed the events while seated in Tamburello's pickup, stated that the other two officers were still in the backyard at the time Brosseau fired." Pet. App. 31.

[3] "By all accounts, however, Haugen was on the receiving end of the violence." Pet. App. 39 (citing the accounts of those who, unlike Officer Brosseau, were actually present at the time of the brawl).

That Judges Officer Brosseau Based On Hindsight

In addition to the "on scene perspective", the Ninth Circuit disregarded this Court's admonition that the reasonableness of the officers' actions must not be viewed in 20/20 hindsight. *Saucier*, 533 U.S. at 206; *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (rejecting post hoc evaluations of more reasonable interpretations). The relevant inquiry is into "reasonableness of the moment". *Saucier*, 533 U.S. at 206.

> "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Saucier*, 533 U.S. at 207.

The Ninth Circuit's analysis contravenes this Court's standard of reasonableness of the moment by ignoring the proper temporal perspective, and improperly judging Officer Brosseau based on after-acquired knowledge. For example, the Ninth Circuit found Brosseau's actions unreasonable because: (1) after her decision to fire the shot, Haugen revealed that his bold decision to return to a closely guarded vehicle was not intended to inflict injury on those involved in the altercation – the very persons that Brosseau knew Haugen had cause to be unhappy with (Pet. App. 28); (2) after her decision to fire the shot, Haugen was lucky enough to navigate his reckless getaway by making a "clear, straight shot" through a "small, tight space" (Pet. App. 30, 39); (3) after her decision to fire the shot, Haugen was unable to reach speeds higher than 45 m.p.h., the maximum possible speed in third gear (Pet. App. 16, 39, 50-51)[4]; (4) after her decision to fire the shot, innocent persons or vehicles did not emerge onto the streets, lawns, or sidewalks in the path of Haugen's escaping vehicle (Pet. App. 39); and (5) after her decision to fire the shot, Haugen did not lead police on an out-of-control high-speed chase. See Pet. App. 33.

The Ninth Circuit's 20/20 perspective is inconsistent with this Court's temporal perspective, and raises a host of important problems necessitating review by this Court. The reasonableness of Brosseau's decision is not undermined by the fact that, after her split-second decision to use force, Haugen managed not to collide with other persons or vehicles during his flight from the scene. Unfortunately, officers do not have the luxury of waiting to see if mayhem will actually materialize on a residential street (or in a small, tight space) before deciding how much force may be necessary to prevent that mayhem.

The Ninth Circuit's post hoc reliance on Haugen's successful negotiation of the "tight, small space" is also troubling. An officer's reasonable and discretionary assessment of the dangerousness posed

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[4] The majority inexplicably concludes that Haugen drove away "safely", when there is no dispute Haugen was convicted for driving away with criminal recklessness. And to the extent that the Ninth Circuit considered this residential driving "safe" because it was less than fort-five miles an hour, it was only so because Brosseau shot Haugen. *See* Pet. App. 50-51; Pet. App. 16 (Judge Fletcher noted, "According to Haugen, he never got the Jeep past third gear and never drove faster than forty-five miles per hour."); Pet. App. 39 (Judge Fletcher observed, "Indeed, he [Haugen] was able to drive away safely even after Brosseau shot him.").

by a fleeing vehicle should not be superceded by the escaping suspect's perspective (uncritically adopted by the court) that he has a "clear, straight shot", especially where the allegedly clear shot involves shooting a Jeep Cherokee out of an admittedly "small, tight space" populated by potential victims. Pet. App. 30. The Ninth Circuit accepts Haugen's after-the-fact conclusion that he had a safe and unimpeded escape route without regard to Officer Brosseau's perspective or knowledge of the allegedly "clear, straight shot", and without considering the escalating crisis of the moment.

By trusting in the unknown driving ability of a reckless man whose intention to negotiate the tight spot without causing harm was unknown, the Ninth Circuit's decision fails to consider the big picture, overlooking important and undisputed aspects of the factual setting. Officer Brosseau made her difficult decision against the backdrop of a residential neighborhood on a Sunday afternoon. Add to this the undisputed facts that the vehicle had to maneuver through an area populated by bystanders, occupied vehicles and roaming pedestrian officers. If the Ninth Circuit holds that this setting was not worthy of police protection from a berserker suspect in a Jeep Cherokee, then what about a busy airport concourse, the checkpoint for a governmental facility, or an elementary school parking lot?

This Court's standard in *Garner* does not suggest an exception for felons who manage to make their way into the driver's seat of an automobile, and then perceive an escape route through a maze of vehicles and potential victims. The standard still looks to those facts known, at the moment when

force was used, from the perspective of the officer on the scene.

Ironically, to the extent that hindsight is relevant, it actually confirms the effectiveness of Officer Brosseau's decision to fire a single shot into an individual who, without fatality, was prevented from reaching the escape speeds that all too frequently result in death or serious bodily injury. In this respect hindsight rewards Officer Brosseau with a job that very likely could have prevented death or injury to persons taking advantage of a Sunday afternoon drive or stroll in their residential neighborhood.

Rather than the punishment of civil rights liability, Officer Brosseau should be commended for her selfless bravery in the face of imminent danger to herself, and those residing in the quiet residential neighborhoods of Puyallup, Washington. Officer Brosseau's actions were taken in the course of an evolving situation during which she made every effort to use non-lethal force – verbal commands, wrestling over car keys, breaking a window and injuring herself in the process, and striking the fleeing suspect while giving additional verbal commands. In the midst of this escalating situation, Haugen's only response was his terrifying statement that Brosseau would have to kill him to stop him. As portended by his behavior immediately prior to the shooting, Haugen sped away as fast as he could through the residential neighborhood. Fortunately for those in the vicinity (including adjacent streets and intersections), Brosseau's single shot at the critical moment of Haugen's departure successfully prevented Haugen from achieving speeds higher than what is possible for a red-lining, 3,000-pound

Jeep Cherokee in third gear with the pedal to the floor. Pet. App. 50-51. While these facts are not a part of Officer Brosseau's contemporaneous knowledge, they confirm the effectiveness of a difficult decision to use force that might otherwise have resulted in a community tragedy worse than the wound inflicted on the fleeing felon. This is precisely the type of balancing that *Garner* turns on, and here the facts decisively tip the scales of justice in favor of Officer Brosseau, and her decisive protection of public safety.

3. The Ninth Circuit's Departure From *Garner* Sends The Wrong Message To Officers And Offenders, Raising An Issue Of Substantial Public Importance

Under *Garner*, officers may use deadly force when there is probable cause to believe a suspect presents a threat of serious bodily harm to others. *Garner*, 471 U.S. at 11. This probable cause standard was easily satisfied under the undisputed facts of this case, where a fleeing felon returned to the crowded scene of an altercation and police search, fought his way into a Jeep Cherokee, and unequivocally demonstrated that deadly force was the only way to prevent him from recklessly wielding a 3,000-pound "weapon" to facilitate his escape through a residential community on a Sunday afternoon.

The Ninth Circuit chose to disregard this Court's standard of objective reasonableness, which looks to the "on the scene" and "at the moment" perspective of the police officer. In its place, the Ninth Circuit has created a standard that imputes

the officer with knowledge of facts known by other bystanders, and with facts that did not develop until after deadly force was used. This troubling distortion of Fourth Amendment law and the standard of qualified immunity will interfere with law enforcement within the Ninth Circuit. The Amici States respectfully ask this Court to review this case and reaffirm that *Garner*'s on the scene and at the moment perspective does not cease to apply merely because a felon chooses to flee in a speeding vehicle, rather than on foot.

Under *Garner*, this is not a close case. If allowed to stand, the Ninth Circuit's departure from *Garner* for persons who threaten harm with vehicles will unleash uncertainty and confusion throughout the circuit. The decision will impair law enforcement officers' ability to make the critical decision whether or not to use force reasonably perceived as necessary to apprehend those who unquestionably present a significant risk of death to police officers, innocent individuals in the immediate vicinity, and other community members who may unknowingly emerge onto a street or intersection in the path of an otherwise unstoppable motor vehicle.[5]

The Ninth Circuit's published decision sends the wrong message to police - no matter how dangerous a vehicular flight may be to the lives of

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[5] Haugen ultimately plead guilty to a felony eluding charge, an admission that he drove "his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing vehicle". Wash. Rev. Code § 46.61.024. In Washington, the only other driving related offenses that are more serious are Vehicular Assault (Wash. Rev. Code § 46.61.520), and Vehicular Homicide (Wash. Rev. Code § 46.61.522).

officers and others, officers in Brosseau's predicament must necessarily hesitate, if not categorically forego the split-second decision to prevent the serious risk of imminent human carnage that is all too often wrapped up in the wreckage of a high speed vehicular flight.[6] Conversely, the message to the felon is a green light: acts of desperation and reckless escape will be rewarded not with apprehension, but with the unimpeded getaway facilitated by the Ninth Circuit's threat of civil rights liability for those public servants who would otherwise exercise their discretion and responsibility to protect the public from unreasonable risk of serious bodily harm and death.

B. This Court Needs To Clarify The Circumstances Under Which A Constitutional Right Is Clearly Established

Under *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), a court determining whether qualified immunity is available, as a matter of law, to a particular law enforcement officer, is required to make a two part inquiry: (1) whether a constitutional right would have been violated on the facts alleged; and (2) whether that right was clearly established at the time of violation, and, consequently, whether it

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[6] Research confirms the substantial risk of harm posed by high speed flight, and that a high percentage of fatalities and injuries occur within the first two minutes. *See* John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI Law Enforcement Bulletin 14 (July 2002); G.P. Alpert, U.S. Department of Justice, National Institute of Justice, *Pursuit Management Task Force Report* (1998).

would have been clear to a reasonable officer that her conduct was unlawful in the situation she confronted.

The Ninth Circuit's erroneous determination that Officer Brosseau had received fair and clear warning that her use of deadly force in pursuit of a fleeing felon (whom she believed to be poised to use a 3000-pound Jeep as a weapon) would be a violation of his Fourth Amendment rights and, consequently, should be denied qualified immunity under *Saucier* and *Anderson* requires that this Court clarify the circumstances under which a constitutional right is "clearly established".

In *Saucier*, this Court acknowledged that *Graham v. Connor*, 490 U.S. 386 (1989), one of the primary cases relied upon by the Ninth Circuit in determining that Officer Brosseau was not entitled to qualified immunity, "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness". *Saucier*, 533 U.S. at 201-02. But then this Court went on to emphasize that this "general proposition" is "not enough". *Id.* Quoting *Anderson* and *Wilson v. Layne*, 526 U.S. 603, 615 (1999), this Court concluded: "[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.*

Although the Ninth Circuit opinion in *Haugen* pays lip service to the definition of "clearly established" articulated in *Saucier* (*see* Pet. App. 41), the circuit court's determination Officer Brosseau is not entitled to qualified immunity – on on the basis

of a general Fourth Amendment proposition alone – demonstrates that additional clarification of how a court determines whether a right is "clearly established" is required from this Court. In this context, the Ninth Circuit's interpretation of this Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985), *Graham v. Connor*, 490 U.S. 386 (1989), and *Hope v. Pelzer*, 536 U.S. 730 (2002), is particularly problematic.

In *Graham*, 490 U.S. at 388, this Court made the general determination that "a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness standard', rather than under a substantive due process standard". But the circumstances of *Graham* make it clear that the right established by that case would have provided little assistance to Officer Brosseau in determining whether her conduct was unlawful.

Dethorne Graham, the plaintiff in *Graham*, was a diabetic who rushed out of a convenience store because he was experiencing the onset of an insulin reaction. Officer Connor became suspicious, conducted an investigative stop, ignored Graham's requests for sugar and juice, and, with the assistance of other several officers, brutalized him until he received word from the convenience store that Graham had done nothing wrong. Nothing in *Graham* would have given Officer Brosseau fair warning that her decision to use deadly force against an individual characterized in Judge Gould's dissent as "a visibly disturbed felon willing to do almost anything to avoid capture" was unlawful. Pet. App. 48.

Similarly, in *Garner*, this Court found that the Tennessee statute defining the terms under which deadly force could be used by a police officer[7] was not unconstitutional on its face, but was unconstitutional as applied under the particular circumstances of *Garner*, where the fleeing burglar – a fifteen year old, 5'4", 100 pound eighth grader – did nothing to suggest that he posed a serious threat of physical harm:

> "[Tenn. Code Ann. § 40-7- 108 (1982)] is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

Wash. Rev. Code § 9A.16.040, is similar to Tenn. Code Ann. § 40-7-108 (1982) in that it provides that the "use of deadly force is justifiable . . . [w]hen necessarily used by a peace officer . . . .[t]o arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony."[8]

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[7] The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7- 108 (1982).

[8] At the time *Garner* was decided, Washington was identified in the opinion as one of nineteen states that had codified the common law rule (which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant). *Garner*, 471 U.S. at 16, n.14.

Washington law also provides: "If after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." Wash. Rev. Code § 10.31.050.[9]

On the basis of *Garner*, Officer Brosseau could reasonably have believed the Washington deadly force statute, which is not unconstitutional on its face, would not be "constitutionally unreasonable" as applied to prevent Haugen's escape under circumstances dramatically different from *Garner* and where, in accordance with the legal principle articulated in *Garner*, she had "probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to [her] or to others". *Garner*, 471 U.S. at 11.

The Ninth Circuit has also misapplied this Court's analysis in *Hope*, in an effort to avoid *Anderson v. Creighton's* requirement that the:

> "[R]ight the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant,

[9] Three years after *Garner*, was decided, the Washington Supreme Court identified Wash. Rev. Code § 9A.16.04 and Wash. Rev. Code § 10.31.050 as statutes that served as clear examples of the use of "lawful authority" ("A casual perusal of our state's written laws reveals several instances in which an individual lawfully may threaten injury to another. The Court of Appeals notes the most obvious-- a police officer apprehending a dangerous criminal. *State v. Smith*, 48 Wn. App. 33, 36, 737 P.2d 723 (1987). The officer's authority to shout "stop, or I'll shoot" derives from his power to "use all necessary means to effect [an] arrest", including force. Wash. Rev. Code § 10.31.050, *see also* Wash. Rev. Code § 9A.16.020(1); Wash. Rev. Code § 9A.16.040.")

> sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

In *Hope*, this Court discussed in detail its holding in *United States v. Lanier*, 520 U.S. 259 (1997), and the circumstances under which general statements of the law are sufficient to give a state official fair and clear warning that her actions will be unlawful. But, as part of its discussion this court also acknowledged:

> "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Hope*, 536 U.S. at 740-41 (citing *Anderson*, 483 U.S. at 640 and *Lanier*, 520 U.S. at 270-71).

Garner is precisely the sort of case identified by this Court in *Hope* as requiring a precedent with a very high degree of factual particularity. In *Garner*, this Court held that the Tennessee statute authorizing the use of deadly force in pursuit of a fleeing felon was not unconstitutional on its face, but was unconstitutional as applied to the particularly callous circumstances of that case. Under this Court's analysis in *Hope*, the Ninth Circuit should not have been able to rely upon the general constitutional rule articulated in *Garner* and *Graham* to conclude that Officer Brosseau had received fair and clear warning that her use of deadly force in pursuit of a disturbed, determined, dangerous felon would be a violation of his Fourth Amendment Rights. Given that she was acting under

a state statute, and a common law rule, understood, after *Garner*, to have been constitutional on its face, a precedent with a high degree of factual particularity would have been required to give her fair warning that her conduct would be unlawful. The cases discussed in detail in Officer Brosseau's Petition for Certiorari and in the dissenting opinion of Judge Gould - including *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000), *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992), and *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) – ably demonstrate that that no precedent with the appropriate level of particularity exists.

The Ninth Circuit's determination that Brosseau was not entitled to qualified immunity is also problematic because the Fourth Amendment analysis that is required entails a balancing test. The Seventh Circuit has held that absent a closely corresponding factual and legal precedent, a court cannot conclude that a right is "clearly established" if the "existence of the right or the degree of protection it warrants in a particular context is subject to a balancing test". *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986), *overruled on other grounds by* Fed. R. Civ. P. 50 (1991 Amendments). *See also Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), *overruled on other grounds by Burns v. Reed*, 500 U.S. 478 (1991) (relying on *Allphin* to conclude that "[w]here the state asserts a compelling interest for intruding into the plaintiff's privacy, the balance may weigh against protection of the right, and the intrusion may be justified"); *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989) (upholding a claim of qualified immunity for social workers who had taken a child into protective custody after noting that the case

"involve[d] the difficult balancing of a family's right to autonomy against the state's interest in protecting minor children from abuse"); *Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998) ("Because the underlying determination pursuant to *Pickering* whether a public employee's speech is constitutionally protected turns on a context-intensive, case-by-case balancing analysis, the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under *Harlow* and its progeny" [citations omitted]).

The present case, like *Allphin*, requires a balancing of Mr. Haugen's right to life against the State's interest in protecting its citizens and law enforcement officers from a visibly disturbed felon who had told the officer pursuing him that the only way to prevent him from escaping would be to shoot him. Absent a clearly comparable factual precedent, the Ninth Circuit should not have been able to find that Mr. Haugen's constitutional right was clearly established at the time Officer Brosseau acted.

The Ninth Circuit's misapplication of *Hope* to the clearly articulated principles of *Saucier* and *Anderson* demonstrates that additional clarification of the term "clearly established" is required from this Court. Under the particular circumstances of this case, general Fourth Amendment principles were insufficient to provide Officer Brosseau with full and fair warning that her actions were unconstitutional. Amici request that this Court accept the Officer Brosseau's petition in order to clarify the level of factual particularity required, in a case of this kind, for a finding that a constitutional principle, is "clearly established".

The Amici States submit that, without question, Officer Brosseau reasonably determined that Respondent Kenneth Haugen, in his violent and out-of-control effort to escape in a 3,000-pound Jeep Cherokee, posed a threat of serious physical harm to the officers, bystanders, and others in the Puyallup neighborhood. For this reason, the Amici States urge this Court's review of the Ninth Circuit's ruling that Officer Brosseau's difficult decision in this case somehow presents a violation of constitutional rights for which qualified immunity is not available.

CONCLUSION

For the foregoing reasons, the amici respectfully request that this Court grant the petition for a writ of certiorari filed by Rochelle Brosseau.

Respectfully submitted.

CHRISTINE O. GREGOIRE
Attorney General

Talis Abolins*
Catherine Hendricks
Assistant Attorneys General
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600

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**Counsel of Record*